Supreme Court, U.S.
FILED

041634 MAY 31 2005

OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

GLOBE NEWSPAPER COMPANY, INC.
and RICHARD A. KNOX,

Petitioners,

v.

LOIS J. AYASH, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

JONATHAN M. ALBANO
Counsel of Record
CAROL E. HEAD
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Attorneys for Petitioners

Of Counsel:

GEORGE FREEMAN
THE NEW YORK TIMES COMPANY

194500

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the First Amendment or the Due Process Clause of the Fourteenth Amendment prohibits a public figure libel plaintiff from recovering default judgments against the press without a showing of falsity or actual malice as a contempt sanction for refusing to disclose confidential news sources sought for non-actionable, non-libel claims.

2. Whether, and to what extent, the First Amendment prohibits the forced disclosure of confidential news sources in civil cases in the absence of jury issues on the essential elements of the plaintiff's case.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings below were the plaintiff Lois J. Ayash, M.D., and the defendants Dana-Farber Cancer Institute, David Livingston, M.D., Globe Newspaper Company, Inc. and Richard A. Knox. David Livingston, M.D., no longer is a party to the case.

Petitioner Globe Newspaper Company, Inc. is wholly owned by The New York Times Company, a publicly traded company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings and Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xii
Opinions Below	1
Jurisdictional Statement	1
Constitutional Provisions Involved	1
Statement of the Case	2
A. Preliminary Statement	2
B. Statement of Facts	5
1. The Dana-Farber Overdose Controversy	5
2. Proceedings before the Trial Court	6
3. The Supreme Judicial Court's Decision	9

Contents

	Page
Reasons for Granting the Petition	10
A. Certiorari Review Should be Granted Because the Decision of the Massachusetts Supreme Judicial Court Directly Conflicts with Governing First Amendment and Due Process Decisions of this Court.	10
B. The Supreme Judicial Court's Decision Conflicts with Decisions of State Courts of Last Resort and Circuit Courts of Appeal. ..	16
C. Certiorari Review Should Be Granted to Resolve the Longstanding Conflict Concerning Whether and to What Extent the First Amendment Protects Confidential Sources Sought in Civil Cases.	19
Conclusion	25

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bartnicki v. Vopper, 532 U.S. 514 (2001) 15, 24

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 14

Branzburg v. Hayes, 408 U.S. 665 (1972) ..19, 20, 21, 22

Bridges v. California, 314 U.S. 252 (1941) 11

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 20, 22, 23

Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) 20, 23

Consolidated Edison Co. v. Public Service Commission of N.Y., 447 U.S. 530 (1980) 12

Craig v. Harney, 331 U.S. 367 (1947) 10, 11

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 2, 12

DeGregory v. New Hampshire Attorney General, 383 U.S. 825 (1966) 24

DeRoburt v. Gannett Co., 507 F. Supp. 880 (D. Haw. 1981) 17

Cited Authorities

	Page
Dowd v. Calabrese, 577 F. Supp. 238 (D.D.C. 1983)	18
Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334 (9th Cir. 1985)	17
Freedman v. Maryland, 380 U.S. 51 (1965)	13
General Insurance Co. of America v. Eastern Consolidated Utility, Inc., 126 F.3d 215 (3d Cir. 1997)	16
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	12
Gonzales v. National Broadcasting Co., 194 F.3d 29 (3d Cir. 1999)	20
Hovey v. Elliott, 167 U.S. 409 (1897)	13
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)	12, 19
In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987)	21
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)	13

Cited Authorities

	Page
LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986)	20
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	24
Laxalt v. McClatchy, 116 F.R.D. 438 (D. Nev. 1987)	18
Mazzella v. Philadelphia Newspapers, Inc., 479 F. Supp. 523 (E.D.N.Y. 1979)	18
McKevitt v. Pollasch, 339 F.3d 530 (7th Cir. 2003)	21, 22
Miller v. Transamerica Press, Inc., 621 F.2d 721 (5th Cir. 1980), *cert denied*, 483 U.S. 1021 (1987)	20, 22
Montana v. Kennedy, 366 U.S. 308 (1961)	11
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)	19
New York Times v. Sullivan, 367 U.S. 254 (1964)	2, 3, 11
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)	3, 12

Cited Authorities

	Page
Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	12
Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979)	20
Sharon v. Time Inc., 599 F. Supp. 538 (S.D.N.Y. 1984)	18
Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993)	20
Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977)	20
In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004)	21
Speiser v. Randall, 527 U.S. 513 (1958)	13
Thompson v. City of Louisville, 362 U.S. 199 (1960)	11
United States v. Kahaluu Construction Co., Inc., 857 F.2d 600 (9th Cir. 1988)	16
Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981)	20

Page

STATE CASES

Atlanta Journal-Constitution v. Jewell, 251 Ga. App. 808, 555 S.E.2d 175 (2001), *cert. denied*, Georgia Supreme Court (Feb. 11, 2002), *cert. denied*, 537 U.S. 814 (2002) 21, 23

Caryl Richards, Inc. v. Superior Court, 188 Cal. App. 2d 300, 10 Cal. Rptr. 377 (1961) 17

Dalitz v. Penthouse International Ltd., 214 Cal. Rptr. 254, 168 Cal. App. 3d 468 (1985) 17

Downing v. Monitor Publishing, 120 N.H. 383, 415 A.2d 683 (1980) 17

Gagnon v. District Court, 632 P.2d 567 (Colo. 1982) 21

Grand Forks Herald v. District Court, 322 N.W.2d 850 (N.D. 1982) 20

Hopewell v. MidContinent Broadcasting, 538 N.W.2d 780 (S.D. 1995) 20

In the Matter of a Grand Jury Subpoena, 411 Mass. 489, 583 N.E.2d 241 (1992) 13

Mitchell v. Superior Court, 37 Cal. 3d 268, 690 P.2d 625 (1984) 20, 22

Cited Authorities

Page

Mitchell v. Watson, 58 Wash. 2d 206, 361 P.2d 744 (1961) 16

Oak Beach Inn Corp. v. Babylon Beacon, Inc., 62 N.Y.2d 158, 464 N.E.2d 967 (1984), *cert. denied*, 469 U.S. 1158 (1985) 16

In re Roche, 381 Mass. 624, 411 N.E.2d 466 (1980) 23

Sands v. News America Publishing Co., 161 A.D.2d 30, 560 N.Y.S.2d 416 (1990) 18

Sierra Life v. Magic Valley Newspapers, 101 Idaho 795, 623 P.2d 103 (1980) 16

Sprague v. Walter, 518 Pa. 425, 543 A.2d 1078 (1988) 18

State ex. rel. Hudok v. Henry, 182 W. Va. 500, 389 S.E.2d 188 (1989) 20

Winegrad v. Oxberger, 258 N.W.2d 847 (Iowa 1977) 20, 22

Cited Authorities

Page

FEDERAL STATUTES

28 U.S.C. § 1257(a) 1

STATE STATUTES

Fla. Stat. Ann. § 90.5015 22

N.Y. Civ. Rights Law § 79-h 22

MISCELLANEOUS

H. P. Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. 518 (1970) 13

J. Golinski, The Second Circuit's Imposition of Litigation-Ending Sanctions for Failures to Comply with Discovery Orders: Should Rule 37(B)(2) Defaults and Dismissals be Determined by a Roll of the Dice?, 62 Brook. L. Rev. 585 (1996) 17

Jennifer L. Marmon, Note, Intrusion and the Media: An Old Tort Learns New Tricks, 34 Ind. L. Rev. 155 (2000) 21

Potter Stewart, Or of the Press, 26 Hastings L.J. 631 (1975), *reprinted in* 50 Hastings L.J. 705 (1999) 20, 25

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Judicial Court Of Massachusetts Decided February 9, 2005 ..... 1a

Appendix B — Order Of The Massachusetts Superior Court On Post-Trial Motions Of All Parties Dated August 28, 2003 ..... 57a

Appendix C — Memorandum Of Decision And Order Of The Massachusetts Superior Court Dated April 2, 2001 ..... 69a

Appendix D — Order Of The Massachusetts Superior Court Dated June 13, 2000 ..... 75a

Appendix E — Memorandum Of Decision And Order Of The Massachusetts Superior Court Dated October 21, 1999 ..... 77a

Appendix F — Opinion Of The Massachusetts Appeals Court Dated February 26, 1999 ..... 84a

Appendix G — Order Of The Supreme Judicial Court For The Commonwealth Of Massachusetts Denying Petition For Rehearing Dated March 2, 2005 ..... 98a

Petitioners Globe Newspaper Company, Inc., and Richard A. Knox respectfully pray that a writ of certiorari issue to review the judgment of the Massachusetts Supreme Judicial Court entered in this proceeding on February 9, 2005.

OPINIONS BELOW

The opinion of the Supreme Judicial Court (App., *infra*, 1a-56a) is reported at 443 Mass. 367, 822 N.E.2d 667 (2005). The opinions of the Superior Court (App., *infra*, 57a-68a, 69a-74a, 75a-76a, 77a-83a) are unreported. The opinion of the Massachusetts Appeals Court vacating a prior contempt sanction in this case (App., *infra*, 84a-97a) is reported at 46 Mass. App. Ct. 384, 706 N.E.2d 316 (1999).

JURISDICTIONAL STATEMENT

The Supreme Judicial Court's judgment was entered on February 9, 2005. A timely petition for rehearing was denied on March 2, 2005 (App., *infra*, 98a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of their grievances."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Preliminary Statement

In its decision below, the Massachusetts Supreme Judicial Court allowed a public figure libel plaintiff to recover damages against the press without proof of falsity or actual malice, the first court to do so in the nearly forty years since this Court ruled in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) that the First Amendment requirements of *New York Times* v. *Sullivan*, 367 U.S. 254, 279-80 (1964) apply to public figure libel claims. The Massachusetts court held that trial courts are free to disregard the constitutional requirements of a public figure libel case when entering a civil contempt sanction for a defendant's refusal to provide discovery exclusively sought for a plaintiff's legally deficient *non*-libel claims.

The sanction violated the First Amendment and the Due Process Clause for the following reasons:

1. The sanction of a default judgment entered in favor of a public figure libel plaintiff did not require proof of falsity or actual malice, in violation of the First Amendment.

2. Entering a default judgment on a public figure's libel claims bore *no* relationship to the non-libel claims in which the order to provide discovery was entered and thus was an unnecessary and overbroad infringement of First Amendment and Due Process rights.

3. The trial court explicitly ruled that the severity of the sanction was based on the defendants having previously failed to comply with a prior contempt order that had since been

overturned on appeal, thus punishing the defendants for successfully exercising their right to appeal.

4. The discovery at issue concerned the identities of confidential news sources who provided the press with accurate information on a matter of legitimate public concern about a public figure and whose identities were sought to pursue non-libel claims that failed as a matter of law. Because the sources' identities were, in the Supreme Judicial Court's words, "peripheral at best" to the legally deficient non-libel claims for which their disclosure was ordered, the sanction did not serve any legitimate, let alone compelling, state interest. App. 48a-49a.

As shown below, certiorari review is warranted because the Supreme Judicial Court's decision is directly contrary to settled federal constitutional doctrine established by this Court and punishes truthful speech on matters of what the Supreme Judicial Court called "intense public interest." App. 23a-24a. As such, the decision countervails the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 772-73 (1986), quoting *Sullivan*, 367 U.S. at 270-71, 279-80. Indeed, petitioners respectfully submit that the sanction imposed by the Massachusetts court so offends basic First Amendment and Due Process principles that summary reversal may be warranted.

Certiorari review also should be granted to provide needed guidance to lower courts faced with the task of fashioning remedies for the non-disclosure of confidential

sources sought by libel plaintiffs. The Supreme Judicial Court's decision conflicts with rulings of other state courts of last resort that have reversed on constitutional grounds default judgments entered in libel cases even when the confidential sources actually were sought in and relevant to a plaintiff's libel case. The Supreme Judicial Court's decision also conflicts with remedies adopted by other courts, state and federal, that are more narrowly tailored to avoid infringing First Amendment interests. Certiorari review therefore should be granted to resolve the conflict between lower courts on this issue of vital importance to the functioning of a free press.

Wholly apart from the sanction imposed by the lower court, the underlying order compelling the disclosure of confidential sources raises important First Amendment questions that have divided the lower courts and independently warrant certiorari review. The Supreme Judicial Court held that the petitioners "had no special constitutional .. . testimonial privilege, based on their status as a newspaper publisher or reporter, that would justify their refusal to obey the [discovery] orders." App. 49a-50a n.33. The courts of appeal and state courts of last resort sharply differ over whether or to what extent the First Amendment protects confidential news sources from compelled disclosure in civil cases. Absent certiorari review, the First Amendment rights of the press — and the rights of plaintiffs who sue the press — will continue to exist in patchwork form. Currently, those rights vary from jurisdiction to jurisdiction and in some instances (as in Massachusetts) from state court to federal court within the same jurisdiction. The conflict over the existence and scope of First Amendment protections for confidential sources in civil cases has proven prolonged, intractable and untenable, amply warranting certiorari review by this Court.

B. Statement of Facts

1. The Dana-Farber Overdose Controversy

This case arises out of a civil action brought by Lois J. Ayash, M.D. ("Ayash") against her former employer, the Dana-Farber Cancer Institute (the "Dana-Farber" or the "hospital"), the hospital's former physician-in-chief, David M. Livingston, M.D. ("Livingston"), Globe Newspaper Company, Inc., publisher of *The Boston Globe* newspaper (the "Globe"), and Richard A. Knox, a former Globe reporter currently employed by National Public Radio ("Knox").

Ayash was the Protocol Chair and Principal Investigator for a Dana-Farber experimental breast cancer treatment protocol. In November 1994, two women enrolled in the protocol were accidentally given massive overdoses of a highly toxic chemotherapy drug. One of the patients, 39 year-old Betsy Lehman, a *Boston Globe* health columnist, died as a result of the overdoses. The second patient, school teacher Maureen Bateman, survived the overdoses but suffered severe cardiac damage. App. 7a.

In the months following the discovery of the overdoses, confidential news sources provided Knox, then a Globe reporter, with accurate information that Ayash was the subject of investigations of the overdose incidents conducted by the Dana-Farber and the Massachusetts Board of Registration in Medicine. App. 45a; 9a; 12a-17a. Based on that information, as part of its coverage of the overdoses, the Globe accurately reported that Ayash was the subject of those investigations. App. 12a-17a.[1]

---

1. The Globe ultimately published approximately 50 articles, columns and editorials about the overdoses. Ayash's libel claims (Cont'd)

2. Proceedings before the Trial Court

In proceedings below, Ayash initially — but only temporarily — argued that Knox's confidential sources were relevant to her libel claims against the Globe and Knox. After refusing to comply with the trial court's order to disclose their confidential sources, the Globe and Knox were held in civil contempt.[2] On appeal, the Massachusetts Appeals Court overturned both the discovery order and the contempt citation. App. 84a-97a. The Appeals Court found that the one confidential source Ayash claimed was central to her libel case in fact was already known by Ayash to be her good friend, Dr. Karen Antman. App. 86a-87a & n.7, 96a. The case was remanded to the trial court for a determination of whether the disclosure of confidential sources was required with regard to any of the counts of Ayash's complaint. App. 97a.

(Cont'd)

against the Globe and Knox were based on seven of those articles, only three of which mentioned Ayash by name. The first article, published on March 23, 1995, mistakenly reported that Ayash had countersigned the overdose order. No confidential sources were relied on for the erroneous report, which was caused by Knox misreading a signature on the dosing sheet as Ayash's. The Globe published a correction concerning the error on June 4, 1995. App. 11a n.13; 97a n.16.

2. As a sanction, the trial court imposed a series of escalating fines. The Globe was ordered to pay fines of $1,000 per day, increasing by $1,000 each successive week that the Globe remained in noncompliance. Knox was ordered to pay $100 per day, increasing by $100 each week that he failed to comply with the disclosure order. App. 88a.

On remand, Ayash abandoned her claim that the confidential sources were needed for her libel case against the Globe and Knox. App. 78a n.1; 46a; 87a. The trial court then ordered disclosure of the sources who provided Knox with accurate information about the overdose investigations, ruling that their identities were critical to Ayash's *non*-libel claims against the hospital for leaking confidential information about her and her infliction of emotional distress claim against Knox for publishing that information. App. 45a, 79a-82a; 87a.[3]

When the Globe and Knox refused to comply with the second disclosure order, the trial court again found them in contempt, even though the Globe and Knox then had pending motions for summary judgment seeking the dismissal of all of Ayash's claims against them. App. 51a n.34. Rather than rule on the pending summary judgment motions, the trial court entered a default judgment of liability in favor of Ayash on her libel claims against the Globe and Knox, as well as on her claims against Knox for infliction of emotional distress and interference with business relations. App. 72a-73a.[4]

---

3. The trial court earlier had ruled that the Globe's and Knox's publication of confidential information about the investigations of Ayash was not actionable under either Massachusetts law or the First Amendment, but made no mention of that ruling in its disclosure order. Ayash did not appeal from the dismissal of that privacy claim. App. 2a-3a n.3. Although the trial court also found the sources relevant to Ayash's claims that the hospital's disclosures violated certain contract-based rights, Ayash did not pursue those breach of confidentiality theories, undoubtedly because, as the Supreme Judicial Court held, such contract-based claims — unlike an invasion of privacy claim — do not permit the recovery of emotional distress damages. *See e.g.*, App. 28a. *See also* App. 2a n.2, 25a.

4. When Ayash learned that one of Knox's confidential sources later provided him with information about other topics after the (Cont'd)

The trial court explicitly acknowledged that it had chosen the severe sanction of a default judgment because the Globe and Knox had refused to comply with the court's earlier contempt order — the very order overturned by the Massachusetts Appeals Court. Referring to its prior contempt order, the trial court ruled, "[u]nfortunately, that determination, and the resultant financial sanctions imposed by the court, have not succeeded in securing the Globe Defendants' compliance with the court's discovery orders. Thus, the court must and does impose an alternative sanction authorized by Rule 37(b)(2) — the entry of a default judgment." App. 72a.

As a result of the default judgment, the case was tried before a jury without the Globe and Knox having an opportunity to present a defense on the merits to Ayash's claims. The jury returned a damages award of $2.1 million against the Globe and Knox (with 12% per annum interest from February 1996). The verdict was comprised of $1,890,000 in libel damages ($1,680,000 against the Globe and $210,000 against Knox) and $210,000 in damages against Knox for infliction of emotional distress and interference with business relations. The jury awarded Ayash another $2.1 million on her claims against the Dana-Farber and Livingston. Petitioners' post-trial motions challenging the constitutionality of the discovery order and the contempt sanction were denied by the trial court. App. 66a-67a.

(Cont'd)
overdoses articles without requesting confidentiality, she obtained a further order compelling Knox to identify all Dana-Farber employees who had been non-confidential sources during the two years *after* the overdose articles. App. 46a, 75a-76a. Because the interrogatory obviously was designed to identify a specific confidential source, the Globe and Knox refused to comply with the order.

3. The Supreme Judicial Court's Decision

On appeal, the Supreme Judicial Court ruled that, even without the disclosure of Knox's confidential sources, the evidence at trial was sufficient to prove that the hospital disclosed confidential information about Ayash. App. 22a & n.17. The court nevertheless held that Ayash's privacy claim against the hospital failed "as a matter of law" because "the disclosures about the plaintiff's professional conduct were part of a matter of intense public interest and were not, in any event, of an exceedingly personal or intimate nature. . . ." App. 23a-24a. The court also held that Ayash was a public figure "by reason of her status as chair and principal investigator of an experimental research protocol under which two patients at a prominent research institution received chemotherapy overdoses." App. 23a. The court entered judgment notwithstanding the verdict in favor of the Dana-Farber and Livingston on all of Ayash's claims except for her claim that she had been fired in retaliation for filing a sex discrimination charge. App. 19a-44a.

Given these legal rulings, the Supreme Judicial Court acknowledged that "it might be tempting" to take issue with the trial court's finding that the plaintiff had a compelling need for the sources' identities to pursue her meritless non-libel claims and to "express our opinion that the identities of any confidential sources were, in the end, *peripheral at best* to the plaintiff's case." 48a-49a (emphasis added). *See also* n.3, *supra*. The court nevertheless rejected the petitioners' arguments that the sanction was overly broad and punitive. The court affirmed the default judgment and the underlying discovery order as within the trial court's "broad measure of discretion," holding that the petitioners "had no special constitutional .. . testimonial privilege, based on their status

as a newspaper publisher or reporter, that would justify their refusal to obey the [discovery] orders." App. 47a-51a & n.33.

REASONS FOR GRANTING THE PETITION

A. Certiorari Review Should be Granted Because the Decision of the Massachusetts Supreme Judicial Court Directly Conflicts with Governing First Amendment and Due Process Decisions of this Court.

The Supreme Judicial Court's decision allowed a public figure libel plaintiff to recover damages against the press without proof of the constitutionally required elements of falsity or actual malice. According to the Supreme Judicial Court, the power of civil contempt gave the state trial court a "broad measure of discretion" to disregard the First Amendment's requirements for a public figure libel case, even though the sanction was entered for the failure to produce discovery sought solely for non-libel claims that failed as a matter of law. App. 21a-24a, 45a, 48a-49a. Speech on a matter of public concern about a public figure thereby lost all of its constitutional protections without any showing — indeed, without so much as a contention — that the plaintiff was denied access to *any* evidence needed to pursue her libel claim.

The use of the contempt power in the manner upheld by the Supreme Judicial Court contravenes long-established First Amendment and Due Process precedent of this Court. The importance of the First Amendment's safeguards for speech concerning public figures and public affairs, combined with the Supreme Judicial Court's failure to abide by longstanding precedent of this Court, well-warrants certiorari review of the lower court's ruling. *See generally Craig* v.

Harney, 331 U.S. 367, 368 (1947) (certiorari granted to review whether contempt judgment against press violated the First Amendment "because of the importance of the problem and because the ruling of the [state] court raised doubts whether it conformed to principles announced in [this Court's precedent]"); *Bridges* v. *California*, 314 U.S. 252, 258-59 (1941) (certiorari granted in contempt case because of the "importance of the constitutional question" concerning "our national constitutional policy safeguarding free speech and a free press"); *Thompson* v. *City of Louisville*, 362 U.S. 199, 203 (1960) ("although the fines here are small, the due process questions presented are substantial and we therefore granted certiorari"); *Montana* v. *Kennedy*, 366 U.S. 308, 309 (1961) (certiorari granted "in view of the apparent harshness of the result entailed").

To paraphrase the *Sullivan* Court, "[contempt sanctions] can claim no talismanic immunity from constitutional limitations." 367 U.S. at 269. "The history of the power to punish for contempt . . . and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." *Craig*, 331 U.S. at 373. *See also Bridges*, 314 U.S. at 262 (applying clear and present danger test to validity of contempt power as applied to publications).

A court's exercise of the power of contempt therefore does not lighten the constitutional burden that must be met to justify restrictions on free speech rights. "[I]t has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden

of showing that its restriction is justified." *Hepps*, 475 U.S. at 777. In addition, any state action restricting free speech must be narrowly drawn to serve a compelling state interest. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("[W]e are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved."). *See generally Consolidated Edison Co.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 530, 540 (1980); *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986).

Because of the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern," the First Amendment "allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 52 (1988) (emphasis in original). *See also Gertz*, 418 U.S. at 343; *Butts*, 388 U.S. 130. In *Hepps*, for example, this Court held that a private figure libel plaintiff suing on a matter of public concern was constitutionally required to bear the burden of proving falsity even though the Pennsylvania Shield Law prevented him from obtaining the identity of the confidential sources of the statements that he claimed defamed him. *See Hepps*, 475 U.S. at 779 ("In the situation before us, we are unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law."). Under these bedrock First Amendment principles, a state court's contempt powers do not authorize an order that indiscriminately eviscerates the constitutional

protections for speech about a public figure as a sanction for the failure to produce discovery on unrelated non-libel claims.

Moreover, a discovery sanction entered on claims other than the one in which the discovery at issue was ordered is, as a matter of law, a punitive sanction that violates the First Amendment and the Due Process Clause. As this Court ruled in *Insurance Corp. of Ireland, Ltd.* v *Compagnie des Bauxites de Guinee*, due process requires that a discovery sanction must be "specifically related to the particular 'claim' which was at issue in the order to provide discovery." 456 U.S. 694, 706, 707 (1982). *See generally Hovey* v. *Elliott*, 167 U.S. 409, 446-47 (1897) (default judgment entered for the failure to obey a court order to pay money into court was a form of punishment and therefore violated due process). The First Amendment requires no less by way of procedural safeguards before damages may be awarded for speech about a public figure. *See generally Speiser* v. *Randall*, 527 U.S. 513, 520-21 (1958); *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965).[5] Because the sanction struck constitutional elements of and defenses to a public figure's libel claim as a penalty for the failure to produce discovery in unrelated non-libel claims, it violated the First Amendment and the Due Process Clause.

In this case, the punitive nature of the sanction also is apparent from the rationales expressed by the lower courts. Massachusetts law requires a party resisting discovery to be held in contempt before having the right to appeal.[6] The trial

5. *See also* H. P. Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 518-19 (1970).

6. *See In the Matter of a Grand Jury Subpoena*, 411 Mass. 489, 490, 583 N.E.2d 241, 243 (1992) (no right to appeal disclosure order absent finding of contempt).

court nevertheless explicitly ruled that its reason for choosing the ultimate sanction of a default judgment was that the Globe and Knox had not obeyed a prior contempt sanction before it was overturned by the intermediate state appellate court. App. 72a. Similarly, the Supreme Judicial Court's conclusion that the default judgment was warranted because the petitioners made a "deliberate choice" to protect their sources and to "forgo their (potentially meritorious) defenses to the claims asserted against them rather than obey the judge's orders," placed the petitioners in the untenable position of either waiving all rights to appeal by complying with the discovery order or having their attempt to exercise appellate rights held against them. App. 49a. Under the reasoning of both lower courts, the exercise of the right to appeal was treated as a justification to strike constitutional elements of and defenses to a libel claim. App. 49a, 72a. *Compare Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (punishing a person who has done 'what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'") (citations omitted).

The needless nature of these constitutional violations is underscored by the Supreme Judicial Court's holding that Ayash's privacy claims against the Dana-Farber failed as a matter of law, and by the court's ruling that even without the revelation of Knox's sources, the evidence was sufficient to prove that the hospital made the disclosures at issue. App. 22a & n.17, 24a. Ayash's infliction of emotional distress claim against Knox — the other asserted basis for the discovery order — similarly sought recovery for the publication of the very same "confidential" information at

issue in Ayash's failed privacy claim against the hospital and found otherwise not actionable against the Globe and Knox. *See* note 3 *supra*; App. 2a-3a n.3, 23a-24a, 80a. The lower court therefore used meritless civil tort claims as a basis for entering sweeping default judgments on plaintiff's claims, depriving the petitioners of fundamental First Amendment and Due Process rights. *See generally Bartnicki* v. *Vopper*, 532 U.S. 514, 534 (2001) (First Amendment protected dissemination by the press of newsworthy recording of private telephone conversation even if press had reason to know the tape had been obtained by means of an illegal interception). Under these circumstances, the Supreme Judicial Court's statement that the confidential sources were "peripheral at best" to the plaintiff's case was not the result of what the court euphemistically described as a temptation gained by the clarity of hindsight. App. 48a-49a. To the contrary, it was an impulse to state the obvious, and betrays the glaring constitutional defects in the court's ruling that justify certiorari review.

Even assuming, moreover, that Ayash's privacy claims against the hospital or her emotional distress claim against Knox had legal merit, the trial court had ample alternative remedies to entering a default judgment, including the imposition of fines, incarceration or, in the case of the emotional distress claim against Knox, a preclusive order tailored to the alleged relevance of the source to that claim. The decision to forego all such alternatives in favor of an indiscriminate default judgment was a needlessly overbroad violation of petitioners' First Amendment and Due Process rights. The importance of the constitutional interests presented well-warrants plenary review and may also warrant summary reversal.

B. The Supreme Judicial Court's Decision Conflicts with Decisions of State Courts of Last Resort and Circuit Courts of Appeal.

Certiorari review also should be granted because the decision of the Supreme Judicial Court is in direct conflict with decisions of other state courts of last resort. Those courts have held that even when confidential sources are properly sought as part of a plaintiff's libel case, a sanction that precludes any and all defenses is an overly broad and punitive infringement of protected constitutional interests. *See Sierra Life* v. *Magic Valley Newspapers*, 101 Idaho 795, 799-801, 623 P.2d 103, 108-10 (1980) (trial court's sanction was "overly harsh and in the nature of punishment" because there was no suggestion that revelation of confidential source would have produced sufficient proof to sustain a judgment); *Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 62 N.Y.2d 158, 166-67, 464 N.E.2d 967, 971 (1984) ("[a] newspaper should not be required to accept substantial financial loss as the price for continuing to honor a commitment to maintain the confidentiality of one of its sources"), *cert. denied*, 469 U.S. 1158 (1985). *See also Mitchell* v. *Watson*, 58 Wash. 2d 206, 361 P.2d 744 (1961) (reversing default judgment for failure to identify source).

The Supreme Judicial Court's decision also conflicts with several decisions of circuit courts of appeal holding that a discovery sanction entered on a claim other than the one in which the discovery was sought is a violation of due process of law.[7] *See also* J. Golinski, *The Second Circuit's Imposition*

---

7. *See, e.g., General Ins. Co. of Am.* v. *Eastern Consol. Util., Inc.*, 126 F.3d 215, 220-21 (3d Cir. 1997); *United States* v. *Kahaluu Const. Co., Inc.*, 857 F.2d 600, 602 (9th Cir. 1988); *Fjelstad* v. (Cont'd)

of Litigation-Ending Sanctions for Failures to Comply with Discovery Orders: Should Rule 37(B)(2) Defaults and Dismissals be Determined by a Roll of the Dice?, 62 Brook. L. Rev. 585, 588 (1996) (noting the lack of uniformity among circuits for determining when "litigation-ending" sanctions should be imposed).

The conflict created by the Supreme Judicial Court's decision by itself warrants certiorari review. Lower courts frequently are faced with requests for the disclosure of confidential sources in libel cases. When disclosure is ordered (as, for example, when the source is found relevant to the issue of the standard of care) those courts often must address the appropriate sanction for non-disclosure of a confidential source's identity. Such sanctions have ranged from (a) entry of a presumption that there was no source for the statement at issue[8]; (b) a jury instruction that there was no source[9]; (c) an order precluding the defendants from relying on the

---

(Cont'd)

American Honda Motor Co., Inc., 762 F.2d 1334, 1342-343 (9th Cir. 1985); *Caryl Richards, Inc.* v. *Superior Court*, 188 Cal. App. 2d 300, 305, 10 Cal. Rptr. 377, 381 (1961).

8. *See DeRoburt* v. *Gannett Co.*, 507 F. Supp. 880, 887 (D. Haw. 1981) (sanction for non-disclosure was presumption that defendants had no sources); *Downing* v. *Monitor Publ'g*, 120 N.H. 383, 387, 415 A.2d 683, 686 (1980) (refusal to disclose source of quoted statement resulted in entry of presumption at trial that reporter had no source for statement).

9. *Dalitz* v. *Penthouse Int'l Ltd.*, 214 Cal. Rptr. 254, 260, 168 Cal. App.3d 468, 478 (1985) ("failing disclosure the jury would be instructed that there was no source for the article other than those disclosed").

sources for any part of their defense[10]; and (d) an order waiving any protection if the source is used by the defense.[11] Still other lower courts have ruled that a journalist is entitled to testify that he obtained information from what he considered to be a reliable confidential source, and the plaintiff is entitled to attempt to impeach that testimony without the source's identity being revealed.[12] No lower court, however, has approved of a sanction as severe as the default libel judgment affirmed by the Supreme Judicial Court below.

The significance of the Supreme Judicial Court's decision reaches far beyond the parties to this case. As this Court has stated, "a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted 'chilling' effect on speech relating to public

---

10. *Dowd* v. *Calabrese*, 577 F. Supp. 238, 244 (D.D.C. 1983) (precluding defendants from relying upon existence of any unidentified source as evidence of truth or lack of malice); *Sands* v. *News America Publishing Co.*, 161 A.D.2d 30, 37, 560 N.Y.S.2d 416, 421 (1990) (precluding defendants from introducing into evidence confidential source information unless disclosed in advance to plaintiff).

11. *Laxalt* v. *McClatchy*, 116 F.R.D. 438, 452 (D. Nev. 1987) ("if the defendants choose to prove their defense through witnesses whose identities are protected by this order, the defendants will be deemed to have waived the privilege"); *Mazzella* v. *Philadelphia Newspapers, Inc.*, 479 F. Supp. 523, 529 n.3 (E.D.N.Y. 1979) (use of confidential sources as part of defense renders sources' identities discoverable).

12. *Sharon* v. *Time Inc.*, 599 F. Supp. 538, 582-83 (S.D.N.Y. 1984); *Sprague* v. *Walter*, 518 Pa. 425, 441, 543 A.2d 1078, 1086 (1988).

figures that does have constitutional value." *Hustler*, 485 U.S. at 52. The Massachusetts court went far beyond the First Amendment's prohibition against strict liability, however, by affirming a libel award without requiring proof of *any* element of the plaintiff's case. Because default judgments by their nature "deter those who might be tempted to such conduct in the absence of such a deterrent," *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976), unless certiorari review is granted, the sanction approved by the Massachusetts court will chill the constitutionally protected conduct of litigants in other cases.

This case presents the ideal vehicle to resolve this important issue. The issue is presented clearly and simply in a recurring context — a request by a libel plaintiff for an order compelling the disclosure of a confidential news source. Certiorari review should be granted to settle the important issues concerning fundamental First Amendment freedoms and related Due Process rights presented by the Supreme Judicial Court's ruling.

C. Certiorari Review Should Be Granted to Resolve the Longstanding Conflict Concerning Whether and to What Extent the First Amendment Protects Confidential Sources Sought in Civil Cases.

The Supreme Judicial Court held that the Globe and Knox "had no special constitutional . . . testimonial privilege, based on their status as a newspaper publisher or reporter, that would justify their refusal to obey the [discovery] orders." App. 49a-50a n.33. The issue decided by the Supreme Judicial Court has divided lower courts since this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). During that time period, nine federal courts of appeals have held

that, in civil cases, the First Amendment provides a qualified protection for confidential news sources.[13] Several state courts of last resort have reached the same conclusion.[14] *See generally Branzburg*, 408 U.S. at 707-08; *see also id.* at 709-10 (Powell, J., concurring).

Due in large part to sharply divergent interpretations of the *Branzburg* decision and its focus on the criminal justice system, however, there is a lack of uniformity among federal and state courts as to whether the First Amendment provides any protection for confidential news sources in civil cases.[15]

---

13. *See Zerilli* v. *Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *Gonzales* v. *National Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999); *Riley* v. *City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979); *LaRouche* v. *National Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller* v. *Transamerica Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert denied*, 483 U.S. 1021 (1987); *Cervantes* v. *Time, Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Shoen* v. *Shoen*, 5 F.3d 1289, 1292-293 (9th Cir. 1993); *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

14. *See Mitchell* v. *Superior Court*, 37 Cal.3d 268, 279, 690 P.2d 625, 632 (1984); *Winegrad* v. *Oxberger*, 258 N.W.2d 847, 850 (Iowa 1977); *Grand Forks Herald* v. *District Court*, 322 N.W.2d 850, 855 (N.D. 1982); *Hopewell* v. *MidContinent Broad.*, 538 N.W.2d 780, 782 (S.D. 1995); *State ex. rel. Hudok* v. *Henry*, 182 W. Va. 500, 505, 389 S.E.2d 188, 193 (1989).

15. *See generally*, Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975), reprinted in 50 Hastings L.J. 705, 709 (1999) ("the [*Branzburg*] Court rejected the [privilege] claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion,

(Cont'd)

The Seventh Circuit, for example, has concluded in a civil case that *Branzburg* forecloses the recognition of First Amendment protection for reporters. *McKevitt* v. *Pollasch*, 339 F.3d 530, 533 (7th Cir. 2003). *See also In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987) ("we decline to join some other circuit courts, to the extent that they have . . . adopted the qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority [citing five circuit courts that applied the privilege in civil cases]"); *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) ("at least in [civil] situations distinct from *Branzburg*," it is "unsettled" whether the protections are constitutional requirements or "prudential considerations"); *Gagnon* v. *District Court*, 632 P.2d 567, 569 & n.2 (Colo. 1982) (affirming trial court's refusal to recognize a qualified First Amendment privilege in civil cases); *Atlanta Journal-Constitution* v. *Jewell*, 251 Ga. App. 808, 812-14, 555 S.E.2d 175, 179 (2001) ("[t]he United States Supreme Court has declined to recognize or create a testimonial privilege for journalists under the First Amendment to the United States Constitution"), *cert. denied*, Georgia Supreme Court (Feb. 11, 2002), *cert. denied*, 537 U.S. 814 (2002).

Moreover, those courts holding that the First Amendment provides some level of protection against the forced

---

(Cont'd)

perhaps by a vote of four and a half to four and a half"); Jennifer L. Marmon, Note, *Intrusion and the Media: An Old Tort Learns New Tricks*, 34 Ind. L. Rev. 155, 158 (2000) ("[t]he lower courts have struggled to interpret the conflicting principles of *Branzburg*, and the level of constitutional protection extended to newsgathering remains unsettled.").

disclosure of confidential news sources in civil cases have reached varying formulations of the governing constitutional test. *See McKevitt,* 339 F.3d at 532 ("[a] large number of cases" have recognized a reporter's privilege under *Branzburg* but "do not agree on its scope.").[16] State legislatures have attempted to fill this void at a non-constitutional level, but the shield laws now enacted in thirty-one states and the District of Columbia contain widely divergent standards for what information is entitled to protection and under what circumstances.[17]

---

16. *Compare Bruno & Stillman, Inc.*, 633 F.2d at 597 ("[P]laintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery . . . [T]he court [then] must assess the extent to which there is a need for confidentiality."); *Miller*, 628 F.2d at 932 (adopting a three part test: (1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information); *Mitchell* v. *Superior Court*, 37 Cal.3d 268, 279-83, 690 P.2d 625, 632-34 (1984) (adopting a five factor test, including exhaustion of alternative sources of obtaining the information; "mere relevance is insufficient to compel discovery; disclosure should be denied unless the information goes to "the heart of the plaintiff's claim"); *Winegard*, 258 N.W.2d at 852 (plaintiff must show (1) "the information is necessary or critical to the involved cause of action or defenses pled"; and (2) "other reasonable means available by which to obtain the information sought have been exhausted").

17. *See e.g.*, N.Y. Civ. Rights Law § 79-h (absolute privilege for a news reporter to refuse to disclose confidential sources); Fla. Stat. Ann. § 90.5015 (information must be "relevant and material to unresolved issues," unavailable from alternative sources, and serve a "compelling interest").

The differences between these varying approaches is dramatically illustrated in Massachusetts, where vastly different standards apply depending upon whether the discovery is sought in federal or state court. The First Circuit, like some other courts, requires a libel plaintiff seeking to compel the disclosure of confidential news sources to establish, among other things, "jury issues on the essential elements of its case not the subject of the contested discovery." *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980).[18] The Supreme Judicial Court, in contrast, has held that the First Amendment provides absolutely no protection for confidential sources and that disclosure may be ordered even in pursuit of a meritless claim. App. 48a-50a & n.33. Whether the Globe is sued in federal or state court therefore has determined whether its confidential sources are entitled to any level of federal constitutional protection. *See also In re Roche*, 381 Mass. 624, 634 n.11, 411 N.E.2d 466, 473 n.11 (1980) ("The only privilege of Federal constitutional dimension available at deposition to a [journalist] is the Fifth Amendment right against self-incrimination."); *Bruno & Stillman*, 633 F.2d at 595 ("courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights").

The conflicting approaches taken by federal and state courts, as well as state legislatures, as to whether and to what

18. *See also Jewell*, 251 Ga. App. at 814, 555 S.E.2d at 181 ("The trial court should then look to the entire record to determine if each particular claim is legally viable, and if it is, the trial court can then perform the necessary balancing test as to each legally viable allegation of libel."); *Cervantes*, 464 F.2d at 990-94 (granting summary judgment and refusing to order disclosure in view of lack of independent evidence to support claim).

extent confidential sources are entitled to protection from discovery in civil litigation underscore the need for this Court to establish a uniform constitutional floor applicable to all members of the press, regardless of the jurisdictions in which they work or are amenable to process. The uncertainty created by the longstanding conflict is untenable and has existed for a prolonged period. The conflict exists across a number of appellate decisions; the issue has been fully vetted by the lower courts; and the disagreement is unlikely to diminish with the further passage of time. Absent certiorari review, the First Amendment rights of the press and the rights of those who sue the press will continue to vary from state to state and, in some instances — as in Massachusetts — within the same state depending on whether suit is brought in federal or state court.

In this case, a confidential news source provided Knox with accurate information that, according to the Supreme Judicial Court, concerned a matter of "intense public interest" relating to a public figure. App. 23a-24a, 45a. There is no doubt that those communications were protected by the First Amendment. *See Bartnicki*, 532 U.S. at 534; *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 830 n.1 (1978). To intrude upon such a constitutionally protected communication in pursuit of a legally meritless claim is, by any definition, "to probe at will and without relation to existing need" in violation of the First Amendment. *DeGregory* v. *New Hampshire Att'y Gen.*, 383 U.S. 825, 829 (1966). Contrary to the Supreme Judicial Court, absent a demonstrable connection between the discovery sought and a viable legal claim, trial courts have no "broad measure of discretion" to infringe upon protected First Amendment

interests. App. 50a.[19] Because of the importance of the issue to the functioning of a free press, the longstanding conflict concerning whether and the extent to which the First Amendment protects confidential sources from disclosure in civil cases — and, in particular, public figure libel cases — should be finally resolved by this Court.

CONCLUSION

Whether the First Amendment provides the press with protections beyond those available to members of the general public has been, and may continue to be, a question debated by scholars and jurists alike. *See e.g.*, Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975), *reprinted in* 50 Hastings L.J. 705 (1999). There can be no doubt, however, that the press has no fewer rights to free speech and due process of law than does every member of the public. The Supreme Judicial Court's decision flouted that settled constitutional principle in two ways: first, by punishing speech on a matter of public concern about a public figure as a sanction for the failure to provide discovery sought solely for legally deficient, unrelated non-libel claims; and second, by allowing a default judgment in a public figure libel case without proof of falsity or actual malice. The lower court's

---

19. For example, the Supreme Judicial Court stated that Ayash had the right to know if it was Livingston who had divulged confidential information to the Globe. App. 49a. After obtaining Livingston's consent, however, Knox testified as to all of his interviews with Livingston without asserting any claim of privilege. The court also asserted that the Globe and Knox's refusal to comply with the discovery orders precluded Ayash from proceeding against all defendants on a theory of joint and several liability (although there was and is no issue as to the collectability of the judgments below nor is there any viable joint theory in the case that the identity of the confidential source conceivably would bear on). App. 49a.

decision abridges First Amendment and Due Process rights in a manner that directly conflicts with precedent of this Court and decisions of lower courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN M. ALBANO
Counsel of Record
CAROL E. HEAD
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Attorneys for Petitioners

Of Counsel:

GEORGE FREEMAN
THE NEW YORK TIMES COMPANY

APPENDIX A — OPINION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DECIDED FEBRUARY 9, 2005

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SUFFOLK

Argued October 6, 2004
Decided February 9, 2005

LOIS J. AYASH

v.

DANA-FARBER CANCER INSTITUTE & others.[1]

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, SOSMAN, & CORDY, JJ.

GREANEY, J. The plaintiff, Dr. Lois J. Ayash, commenced this action in the Superior Court against the defendants, the Dana-Farber Cancer Institute (Dana-Farber or the hospital); Dr. David M. Livingston; Globe Newspaper Company, Inc., publisher of the Boston Globe (Globe); and Globe reporter Richard A. Knox, seeking damages in connection with a series of events that occurred in the aftermath of the discovery that two patients enrolled in an experimental breast cancer treatment study at Dana-Farber had mistakenly been administered a four-fold overdose of a highly toxic chemotherapy drug. One of the patients, Globe health

1. David M. Livingston, Globe Newspaper Company, Inc., and Richard A. Knox (the latter two collectively referred to as the Globe defendants).

columnist Betsy A. Lehman, died as a result of the overdose. In her complaint, the plaintiff accused the Globe and Knox (together, Globe defendants) of publishing a series of scathing and inaccurate articles about the overdoses and an alleged coverup by Dana-Farber that erroneously attributed culpability to the plaintiff, thereby destroying her reputation and her well-being. The plaintiff's complaint also accused Dana-Farber and Livingston (who was physician-in-chief at Dana-Farber at the time of the overdoses and their discovery) of inappropriately focusing public attention on her, by issuing press releases containing confidential peer review information and by secretly providing to Knox other confidential peer review information. This was done, the plaintiff alleges, in order to deflect attention from widespread deficiencies in the hospital that led to the overdoses and in order to protect other physicians at the hospital. The plaintiff's amended complaint, as far as now relevant, states claims against (1) Dana-Farber for invasion of privacy, breach of the implied covenant of good faith and fair dealing, and unlawful retaliation in violation of G.L. c. 151B, § 4(4)[2]; (2) Livingston for intentional interference with contractual relations; (3) the Globe defendants for libel and defamation[3];

---

2. The plaintiff also asserted a claim against Dana-Farber for gender discrimination and a claim against Dana-Farber and Livingston for defamation and libel. The jury returned verdicts in favor of the defendants on these claims, and the plaintiff does not challenge the verdicts. The plaintiff also asserted a separate claim against Dana-Farber for breach of contract that was submitted, with no objection, to the jury as part of the claim for violation of the implied covenant of good faith and fair dealing.

3. The plaintiff also asserted a claim against the Globe (Cont'd)

and (4) Knox for intentional interference with contractual relations and for intentional or negligent infliction of emotional distress.

During the discovery stage of the litigation, the plaintiff sought the identities of sources consulted by Knox before writing articles, subsequently published in the Globe, that formed, at least in part, the basis of the plaintiff's lawsuit. After the Globe defendants' steadfast refusal to provide information that would lead to the identities of Knox's confidential sources, despite a court order to disclose their identities, a judgment of civil contempt was entered in the Superior Court against the Globe defendants. The Appeals Court vacated the order to disclose and the contempt order, concluding that the defendants had made "some showing" that disclosure of Knox's confidential sources presented a danger to the free flow of information that was more than theoretical or speculative. See *Ayash v. Dana-Farber Cancer Inst.*, 46 Mass.App.Ct. 384 (1999). On remand, the judge allowed the plaintiff's renewed motion to compel the Globe defendants to disclose the identities of their confidential sources. When the Globe defendants continued to refuse, the judge ultimately entered, as a sanction pursuant to Mass. R. Civ. P. 37(b)(2), as amended, 390 Mass. 1208

(Cont'd)

defendants for invasion of privacy. The judge granted a motion filed by the Globe defendants for partial summary judgment dismissing this claim, and the plaintiff has not appealed from that partial summary judgment.

(1984), pretrial default judgments of liability in favor of the plaintiff on her claims against the Globe defendants.[4]

After five weeks of trial (presided over by a different judge than the judge who had dealt with discovery), a jury in the Superior Court found Dana-Farber liable for (1) violation of the plaintiff's statutory right to privacy under G.L. c. 214, § 1B; (2) breach of the covenant of good faith and fair dealing implied in its employment contract with the plaintiff; and (3) unlawful retaliation in violation of G.L. c. 151B, § 4. The jury also returned a verdict in favor of the plaintiff on her claim that Livingston intentionally had interfered with her employment relationship with Dana-Farber. The jury awarded damages against Dana-Farber in the amount of $180,000 for lost compensation and injury to business reputation, $1,080,000 for emotional distress, and $5,000 in punitive damages[5]; the jury also awarded damages against Livingston in the amount of $120,000 for lost compensation and injury to business reputation, and $720,000 for emotional distress. For the plaintiff's defaulted claims against the Globe defendants, the jury awarded her the sum of $1,680,000 against the Globe (reflecting $240,000 in economic damages

---

4. The Globe defendants immediately filed notice of an appeal of the default judgments. A judge in the Superior Court (not the one who entered the sanction orders) granted the plaintiff's motion to strike the appeal on the ground that the appeal was not ripe until after damages had been assessed.

5. Dana-Farber did not appeal from the award of punitive damages. Also not at issue are almost $400,000 in attorney's fees and costs awarded the plaintiff pursuant to her successful G.L. c. 151B claim against Dana-Farber.

and $1,440,000 in emotional distress damages) and $420,000 against Knox (reflecting $60,000 in economic damages and $360,000 in emotional distress damages).

The judge heard motions filed by Dana-Farber and Livingston for the entry of judgment notwithstanding the verdicts; a motion filed by Dana-Farber requesting that the charitable cap, G.L. c. 231, § 85K, be applied to the judgment against it; a motion filed by the Globe defendants challenging the default judgments; and motions for a new trial (or, alternatively, for remittitur) based on excessive damages submitted by all of the defendants. The judge upheld the verdicts against Dana-Farber and Livingston, but agreed that the charitable cap applied to the damages awarded against Dana-Farber. The judge declined to revisit the default judgment (which, as noted, had been entered by another judge). Finally, the judge concluded that damages awarded by the jury, although high, were not excessive and denied all of the defendants' motions for remittitur. An amended judgment was entered allowing the plaintiff to recover the sum of $20,000 (plus costs and interest) from Dana-Farber.[6]

The case is before us on cross appeals. The plaintiff appeals the judge's application of the charitable cap. Dana-Farber appeals the denial of its motion for judgment notwithstanding the verdicts on the retaliation, privacy and implied contract claims. Livingston appeals the denial of his motion for judgment notwithstanding the verdict on the

6. The jury originally awarded damages against Dana-Farber and Livingston jointly. The judge allowed the unopposed motion of Dana-Farber and Livingston to correct the judgment of joint liability to rest against Dana-Farber alone.

intentional interference claim. The Globe defendants appeal the imposition of the sanction of default judgment against them. All of the defendants appeal the denial of their motions for remittitur, or for a new trial, on the issue of excessive damages. We granted the parties' applications for direct appellate review.

For reasons that follow, we vacate the judgments against Dana-Farber for invasion of privacy and for breach of the implied covenant of good faith and fair dealing, and against Livingston for interference with employment relations, and direct the entry of judgments for Dana-Farber and Livingston on those claims. We affirm the verdict against Dana-Farber for the G.L. c. 151B unlawful retaliation claim and conclude that the charitable cap set forth in G.L. c. 231, § 85K, does not apply to damage awards for unlawful retaliation under G.L. c. 151B. We affirm the default judgments, and the corresponding damage awards, against the Globe defendants. Vacating the judgments against Dana-Farber for invasion of privacy and breach of the implied covenant creates a defect in the damages awarded against Dana-Farber which necessitates a retrial on damages. Accordingly, we remand the case to the Superior court for a new trial on the damages to be awarded against Dana-Farber.

1. We begin with an overview of the facts in the light most favorable to the plaintiff. See *Situation Mgm't Systems, Inc. v. Malouf, Inc.*, 430 Mass. 875, 876 (2000); *Cambridgeport Sav. Bank v. Boersner*, 413 Mass. 432, 438 (1992). Additional facts will be discussed as they relate to the parties' claims of error.

Appendix A

a. *The overdoses and the immediate aftermath of their discovery.* In November, 1994, a research fellow at Dana-Farber, Dr. James Foran, accidentally ordered four-fold overdoses of cyclophosphamide, a powerful chemotherapy drug with well known heart toxicity, for two patients in an experimental protocol[7] for breast cancer patients (protocol 94-060) administered under the auspices of Dana-Farber's Solid Tumor Autologous Marrow Program (STAMP).[8] The plaintiff was protocol chair and principal investigator for protocol 94-060. The overdoses were separately administered to two patients, Betsy Lehman and Maureen Bateman, over the course of four days beginning on November 14 and November 16, respectively. The attending physician on duty at the time the orders were written, and the overdose administered to Lehman, was Dr. Gary N. Schwartz. The attending physician on duty at the time the overdose was administered to Bateman was Dr. Anthony Elias, the director of STAMP. Both patients suffered almost immediate adverse reactions to the cyclophosphamide treatment. Bateman survived the overdose but experienced severe cardiac damage. Lehman died on December 3 as a result of the overdose. An autopsy failed to uncover the cause of her death.

---

7. The plaintiff's complaint describes a protocol as a "formal research program[ ] which may involve clinical aspects if experimentation upon human beings is a necessary part of the research effort." We understand a protocol to be, in the context of this case, an experimental treatment plan.

8. The STAMP team at Dana-Farber was comprised of several physicians (including the plaintiff), pharmacologists, and other medical care providers.

Appendix A

The plaintiff began a rotation as the attending physician for Lehman and Bateman on December 1. On the morning after Lehman's death, the plaintiff inquired of another STAMP team physician, Dr. Richardson, whether the correct chemotherapy dose had been administered to Lehman. Richardson responded in the affirmative.[9] As protocol chair and co-director of the STAMP team, the plaintiff informed the director of protocol administration at Dana-Farber of Lehman's death and provided him with pharmacological data about the blood levels of cyclophosphamide and its metabolite in Lehman and in other patients participating in protocol 94-060.[10] To the plaintiff, and to other STAMP team physicians, the data appeared inconclusive. At a meeting approximately two weeks later, the plaintiff, based on her earlier conversation with Richardson, informed a group of STAMP team physicians and members of Dana-Farber's pharmacology department that the cyclophosphamide administered to Lehman had been the correct dosage. During a medical staff retreat, the plaintiff presented the pharmacological data and clinical scenario of all four patients who had undergone protocol 94-060 and stated her view that Lehman's death most probably reflected a modulation of cyclophosphamide. Those present voiced no disagreement.

---

9. Only later did it become apparent that Richardson understood the plaintiff to have inquired as to whether Lehman's potassium level had been checked. Richardson's affirmative answer, thus, was addressed to the question of potassium level and not (as believed by the plaintiff at the time) to whether the proper dose of cyclophosphamide had been administered.

10. The plaintiff did not inform him about Bateman's adverse reaction at this time.

Appendix A

It was not until on or about February 8, 1995, that a Dana-Farber data manager discovered the overdosing errors. The plaintiff reported the errors to Dana-Farber's human protection committee on the following day. The hospital immediately notified both patients' families of the tragic error and suspended all clinical work under protocol 94-060. Livingston, as the hospital's physician-in-chief, began his own informal investigation into the incident by inquiring of other physicians, including Dr. Schwartz and Dr. Foran, as to their version of events. Livingston, however, did not seek the plaintiff's view as to what had occurred.

Dana-Farber established three committees to investigate the circumstances of the overdoses and the hospital's subsequent failure to discover them. First, it convened an internal peer review committee, chaired by Dr. Steven E. Sallan (Sallan committee),[11] to focus on how the overdoses occurred and to recommend steps to prevent a similar tragedy in the future. Dana-Farber also appointed an external peer review committee (Devita committee), headed by Dr. Vincent T. Devita, a national leader in oncology and former director of the National Cancer Institute, to review the Sallan committee report and, if necessary, independently investigate circumstances leading to the overdose. Finally, an internal Dana-Farber audit team was established to perform an in-depth investigation of protocol 94-060 itself.

---

11. Sallan held that position until early May, 1995, when his appointment to serve as Dana-Farber's physician-in-chief was announced. At that time, Dr. Frederick P. Li replaced Sallan as head of the committee. Sallan remained a member of the committee.

Appendix A

On March 22, 1995, Livingston issued two statements. First, in a statement to hospital staff, he described the overdose incidents and the steps that had been, or would be, taken by Dana-Farber in response. Second, in a statement to the news media, Livingston admitted that the overdoses resulted from "human error" and announced that Dana-Farber had "taken additional precautions to ensure that they do not happen again," including the establishment of "two internal review committees and an external review committee" that had been "asked to examine all issues related to this situation." Livingston stated that "once all the facts have been fully analyzed, and the causes of the errors identified," Dana-Farber would "make available to the public the conclusions and recommendations of the committees." The next day, two physicians and three pharmacists were placed on administrative duty and restricted from clinical practice. The plaintiff was not one of those whose clinical privileges were restricted.

b. *Reporting of the overdoses by the Globe.* The discovery of the overdoses was of considerable public interest. Dana-Farber became the subject of intense media coverage, including that in the Globe.[12] On March 23, 1995, the day after Livingston issued the hospital's first press release on the overdoses, the Globe published a front page article, authored by Knox, entitled "Doctor's orders killed

---

12. According to the Globe, it ultimately published almost fifty articles about or related to the overdoses, systemic safeguards, and, generally, the quality of health care at hospitals everywhere. Knox testified at trial that he authored only approximately twenty-seven of these articles and that only six of the articles mentioned the plaintiff by name.

cancer patient." With respect to the overdose administered to Lehman, the article ascribed the erroneous order to a "physician working as a research fellow," but noted that "[f]ive or six other doctors and nurses countersigned the mistaken order, including Dr. Lois J. Ayash, leader of the team." The plaintiff was the only physician named in the article as having any connection to the overdose. Moreover, contrary to what was stated in the article, the plaintiff had not countersigned the overdose order, nor was she the "leader of the team." Despite this error in reporting, no effort was made by Dana-Farber, or by Livingston, to correct the impression that the plaintiff shared responsibility for the overdose error.[13]

On March 24, 1995, the Globe published an editorial concerning the overdoses. The editorial characterized the overdose error as "so glaring that any first-year medical student should have spotted it." The following day, the Globe published an article written by another Globe columnist, Bella English. The column did not mention the plaintiff by name, but described the overdoses as "an appalling series of errors that would make The Three Stooges look like brain surgeons" and stated that the incompetence was "nothing less than criminally negligent homicide."

When Knox directly questioned Livingston as to whether the Globe had been correct in naming the plaintiff as a

13. Knox concedes that he was told within four days of publication that the plaintiff did not countersign the overdose orders. At trial, Knox attributed this error to his own mistake in reading medical records provided him by the attorney for Lehman's estate. The Globe published a correction on June 4, 1995.

countersigner of the erroneous order, Livingston chose to remain silent. Knox interviewed Livingston on March 25. The next day, a second article written by Knox appeared in the Globe, entitled "Dana-Farber studies pattern in overdoses." The article stated that an internal investigation conducted by Dana-Farber was "focusing on why two subsequent patients [in protocol 94-060] got the correct dosage" and suggested that the overdoses could have been "noted by someone on the care team and quietly corrected." The article went on to quote Livingston as stating that the question of a possible cover up was "right smack in the bull's eye" of Dana-Farber's investigation. Livingston was quoted as stating, "It's right in the target range."

c. *Dana-Farber's focus on the plaintiff and the Globe's coverage alleging her culpability.* Article 6 of Dana-Farber's medical staff bylaws contemplate the possibility that "corrective action" be taken against medical staff members for due cause, including, among other things, "conduct that might be inconsistent with or harmful to good patient care or safety, or conduct which is below the standards of the Professional Medical Staff or below the standards of [Dana-Farber]." In a letter to Dr. Barbara E. Bierer, dated March 31, 1995, Livingston requested that corrective action proceedings be initiated against the plaintiff based on her failure, as co-director of STAMP, chairperson of protocol 94-060, and the attending physician[14] of the two victims, to explore the possibility of an overdose, either before or after Lehman's death. A copy of the letter was sent to the plaintiff,

14. The plaintiff disputed at trial whether she had, in fact, been attending physician, but agreed to the general accuracy of Livingston's letter.

along with a letter assuring her that the proceedings would be confidential. That same day, Livingston issued a press release disclosing the initiation of the corrective action process against two unnamed physicians. Under § 6.14 of the medical staff bylaws, the pendency and subject matter of corrective action proceedings are strictly confidential and not to be disclosed.

The next day, a third article written by Knox appeared in the Globe, entitled "Dana-Farber probe widens[,] [t]hree suspended from patient care." The article stated that, on the basis of "new evidence," Dana-Farber "yesterday initiated disciplinary proceedings against two physicians and one pharmacist involved in the chemotherapy overdose of two breast cancer patients, one of whom died." The April 1 article did not identify the plaintiff by name. She was at that time, however, the only member of the STAMP team whose identity had been revealed to the public.

On May 2, an article appeared in the Globe that did identify the plaintiff by name. The May 2 article, written by Knox and entitled "Dana-Farber tests signaled an overdose, records show," stated that, although hospital officials maintained that the "first inkling of the overdoses did not come until [two and one-half] months after Lehman's death," some specialists had indicated that laboratory test results "should have been an early tip-off of the overdoses," and suggested the possibility that Lehman could have survived if the overdoses had been discovered earlier. The article stated: "Ayash and Foran are the only physicians involved in the case who have been singled out in an internal disciplinary process launched last month by Dana-Farber."

Appendix A

On April 1, at the same time that corrective action proceedings against the plaintiff were initiated, Livingston notified the plaintiff that she was being assigned to "administrative duty." The plaintiff continued with the research and writing portions of her job, but was unable to see patients in a clinical setting in connection with the STAMP team. On May 10, a preliminary report documenting the grounds for corrective action against the plaintiff found that the plaintiff had been insufficiently vigilant in not checking the dosing order, but acknowledged that it had not been the common practice of care at Dana-Farber to do so, and concluded that there was "no evidence of a cover-up [ ]or willful misconduct on [the plaintiff's] part." One finding in the report observed that "[t]here are many who think [the plaintiff], as Protocol Chairperson, should be held responsible for the events that have transpired [and] many who feel that she is the victim of scrutiny for political rather than substantial reasons." The author of the report added: "I do not subscribe to either point of view." The report stated the opinion that there was no need for further investigation or discovery and recommended a written reprimand.[15]

On June 30, Dana-Farber's clinical executive committee (committee) agreed with the findings and recommendations of the preliminary corrective action report. The committee concluded, however, that the recommended sanction should be downgraded from a written to an oral reprimand. Both the plaintiff and Livingston were sent a copy of the

15. In early May, Livingston stepped down from his position as Dana-Farber's physician-in-chief. He was quoted as saying, "It's just the thing to do when you're the head and tragic events occur."

committee's report and given the opportunity to comment. On July 12, Livingston expressed his opinion of the report in a strongly worded letter disagreeing with the recommendation of the committee. In the letter, Livingston stated: "Given the gross lack of insight and oversight exercised by the [plaintiff] of a clinical trial in which two patients were directly harmed by massive drug overdose, I question whether an oral reprimand is sufficient Corrective Action in this case." On July 20, the plaintiff responded to Livingston's charges in a letter to Dana-Farber's president, contesting her responsibility for the overdoses and rejecting any suggestion that early discovery of their occurrence would have "altered the subsequent clinical course for either patient." The plaintiff did not elect to respond directly to the committee's report. In August, the conclusions of the committee were endorsed by the executive committee of Dana-Farber's board of trustees (board), which "unanimously recommended a sanction of oral reprimand." On August 8, with this final step of the corrective action proceedings completed, the plaintiff's clinical restrictions were lifted.

Because the plaintiff had been assigned to administrative duties when corrective action proceedings began, Dana-Farber was required to report the plaintiff to the Massachusetts Board of Registration in Medicine (board of registration). The fact that the plaintiff had been reported to the board should have remained confidential until such a time as the board issued a "statement of allegations." The board never issued such a statement, but, after conducting its own investigation, issued a letter of warning to the plaintiff (which was not made public) expressing concern over the plaintiff's failure to investigate the possibility of overdoses despite strong indications of that possibility.

Appendix A

The Sallan committee prepared two key documents entitled: (1) "Synopsis of the Conclusions and Recommendations of the Internal Peer Review Committee of the Board of Trustees of the Dana-Farber Cancer Institute" (synopsis) and (2) "Institute Actions in Response to Synopsis of the Conclusions and Recommendations of the Internal Peer Review Committee" (response). Together the documents outlined the parameters, subject matter, conclusions, recommendations, investigative process and analysis of the Sallan committee. In addition, the synopsis contained the Sallan committee's conclusions and recommendations with respect to the plaintiff. Although efforts apparently were made to limit distribution of the synopsis to appropriate people, an unidentified "confidential source" (someone who Knox considered to be a reliable source on matters pertaining to medicine) provided these documents to Knox in the spring or summer of 1995.

On October 30, when the Sallan committee's work was completed, Dana-Farber issued a press release entitled, "A special report from the board of trustees and administration of the Dana-Farber Cancer Institute to its various constituencies." The contents of the press release was a second synopsis of the Sallan committee's conclusions and recommendations that had been prepared for release to the public. The released synopsis contained no names but referred to the plaintiff as the "[p]rincipal [i]nvestigator" for the protocol.

On October 31, the contents of the synopsis of the Sallan committee report appeared in the Globe in an article, written by Knox, entitled "Dana-Farber Puts Focus on Mistakes in

Overdoses." The article stated that the synopsis "noted that the doctor in charge of the team treating the two overdose victims failed to check the medical records for clues to the sudden death of one patient . . . and the cardiac collapse of a second." The article quoted a Dana-Farber physician as saying that "[s]he did not review the charts to make sure there wasn't an overdose. . . . That should have been done." The article then quoted the following language from the synopsis: "The manner in which this physician investigated the incidents contributed to the delay in detecting the overdoses." The article continued: "Dana-Farber revealed that the physician has been formally reprimanded by a Dana-Farber disciplinary panel for inadequacies in her initial review of the overdose incidents. She also was held partially responsible for ambiguities in the schema, or cover sheet, that summarized the treatment plan. It led the fellow to prescribe the four-fold overdose and fooled pharmacists who checked the medication order. Although the doctor in charge of the treatment protocol was not named by Dana-Farber, earlier reports identified her as Dr. Lois Ayash." The article named the plaintiff and Foran as the two physicians under investigation by the board of registration in medicine in connection with the overdoses. The complete Sallan committee report was never disclosed to the Globe or released to the public.

d. *Initiation of legal proceedings by the plaintiff and Dana-Farber's response.* In November, 1995, the plaintiff filed a charge with the Massachusetts Commission Against Discrimination (MCAD) alleging that Dana-Farber had discriminated against her on the basis of her gender in the terms and conditions of her employment. On February 1,

1996, the plaintiff removed her discrimination claim from the MCAD by filing her complaint in the Superior Court, asserting, among other claims, her claim that she had been the victim of gender discrimination. The next morning, the plaintiff was called to a meeting with Sallan (who by that time had replaced Livingston as Dana-Farber's physician-in-chief), Dr. Donald W. Kufe (a STAMP team leader), and board secretary Kristen Henderson. Sallan opened the meeting by referring to the lawsuit filed the preceding day and informed the plaintiff that clinical positions which he had previously discussed with her as potential assignments were no longer available to her. Kufe informed the plaintiff that she would not be permitted to work with another STAMP team physician who earlier had indicated his willingness to work with the plaintiff. Sallan suggested that the plaintiff work at home in order to avoid awkwardness and advised her to hurry up and finish any manuscripts relating to her work with STAMP. Sallan also informed the plaintiff that he would be assigning the protocols of which she was chair, with the exception of one near completion, to another physician. The plaintiff testified at trial that "it was clear that [Sallan] knew we had filed the lawsuit."

On two earlier occasions, reference was made by the plaintiff's superiors at Dana-Farber to her lawsuit. Once, in late September of 1995 (after the plaintiff had retained counsel but before she had filed her complaint with the MCAD), Dr. Emil Frei, the principal investigator for the STAMP project grant, informed the plaintiff that she could return to the STAMP team immediately, but only on the condition that she agreed to leave within six to twelve months. According to the plaintiff, Frei repeatedly mentioned

lawyers or a lawsuit in the conversation and told the plaintiff that "he would not recommend that [she] proceed with any legal action because it would hurt her." In addition, Kufe once informed her that Dana-Farber would "squash [her] like a bug."

On September 6, 1996, Dana-Farber advised the plaintiff that her employment would not be renewed as of June 30, 1997, the date that her three-year appointment was to expire. The plaintiff subsequently accepted an offer of employment in another State. On October 7, 1999, the plaintiff amended her complaint to assert an additional claim against the hospital for unlawful retaliatory discharge in violation of G.L. c. 151B, § 4(4). We now turn to the merits of this appeal.

2. *Claims against Dana-Farber.* a. *Invasion of statutory right to privacy.* General Laws c. 214, § 1B, creates a statutory right against "unreasonable, substantial or serious" interference with a person's privacy. We have stated that, despite the disjunctive "or," the phrase "unreasonable, substantial or serious" is inclusive, as § 1B "obviously was not intended to prohibit serious or substantial interferences which are reasonable or justified." *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 409 Mass. 514, 517-518 (1991). To recover under the statute for dissemination of private information,[16] a plaintiff must establish that the

16. Prosser discusses four types of conduct that may give rise to a claim of invasion of privacy: (1) appropriation of the plaintiff's name or likeness; (2) unreasonable intrusion upon the plaintiff's seclusion of another; (3) public disclosure of private facts about the plaintiff (even though the facts are true and no action would lie for (Cont'd)

disclosure was both unreasonable and either substantial or serious. As recognized in the Restatement (Second) of Torts, "[e]very individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. . . . When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable [person], there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest." Restatement (Second) of Torts § 652D comment b (1977). "When the subject matter of the publicity is of public concern, . . . there is no invasion of privacy." *Boston Herald, Inc. v. Sharpe,* 432 Mass. 593, 612 (2000), citing Restatement (Second) of Torts, *supra* at comment d.

(Cont'd)

defamation); and (4) publicity which places the plaintiff in a false light in the public eye. See W.L. Prosser & W.P. Keeton, Torts § 117, at 851-866 (5th ed.1984). It is the third type of conduct with which the majority of our cases under G.L. c. 214, § 1B, have been concerned. But see *Schlesinger v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.,* 409 Mass. 514, 519-520 (1991) (suggesting that intrusive conduct demonstrating pattern of harassment might be actionable); *O'Connor v. Police Comm'r of Boston,* 408 Mass. 324, 329-330 (1990) (recognizing that statutory privacy interest may be burdened by "warrantless, suspicionless, urinalysis testing"). We have not adopted an interpretation of G.L. c. 214, § 1B, that would give rise to claim of false light invasion of privacy claim. See *ELM Med. Lab., Inc. v. RKO Gen., Inc.,* 403 Mass. 779, 787 (1989); *Fox Tree v. Harte-Hanks Communications, Inc.,* 398 Mass. 845, 848-849 (1986).

Appendix A

In determining whether there has been a violation of § 1B in the employment context, "it is necessary to balance the employer's legitimate business interest in obtaining and publishing the information against the substantiality of the intrusion on the employee's privacy resulting from the disclosure." *Gauthier v. Police Comm'r of Boston,* 408 Mass. 335, 338 (1990). There was no invasion of a right to privacy when a chief of police, acting in his official capacity, disclosed information about a plaintiff's fitness to be a police officer, see *Mulgrew v. Taunton,* 410 Mass. 631, 637 (1991), or when a police officer informed cadets of a fellow cadet's dismissal for failing a drug test, see *Gauthier v. Police Comm'r of Boston, supra* at 338-339. Cf. *Cort v. Bristol-Myers Co.,* 385 Mass. 300, 306-307 & n. 9 (1982). The statute, essentially, proscribes "disclosure of facts about an individual that are of a highly personal or intimate nature when there exists no legitimate countervailing interest." *Bratt v. International Business Mach. Corp.,* 392 Mass. 508, 518 (1984).

We reject the plaintiff's assertion that release of information as to "proceedings, reports and records of a medical peer review committee," that is statutorily protected from disclosure by G.L. c. 111, § § 203 and 204 (*a*), automatically equates to an invasion of privacy as that term is used in the context of G.L. c. 214, § 1B. General Laws c. 111, § 204, providing for confidentiality of peer review committee proceedings, was enacted to promote rigorous and candid evaluation of professional performance by a provider's peers. See *Beth Israel Hosp. Ass'n v. Board of Registration in Med.,* 401 Mass. 172, 182-183 (1987). The statute is designed to protect the confidentiality of physicians who

participate in peer review. See *Miller v. Milton Hosp. & Med. Ctr.*, 54 Mass.App.Ct. 495, 501 (2002) (peer review privilege "designed to foster a candid exchange of information regarding the quality of medical care"). The words of the statute do not create a private right of action for a physician under investigation to sue for invasion of privacy when protected peer review information of the type involved here is, inadvertently or intentionally, released to the public. See *Borucki v. Ryan,* 407 Mass. 1009, 1009 (1990).

Despite Dana-Farber's continued denials that it (or its agents) leaked any confidential information to Knox, the jury could have made factual findings that Dana-Farber was responsible for the public disclosure that peer review action was proceeding against the plaintiff and that Dana-Farber also was responsible for providing to Knox confidential peer review documents (the Sallan committee's synopsis and response) that suggested some responsibility on the plaintiff's part in connection with the overdoses (or an alleged coverup in the aftermath of their discovery).[17] The plaintiff, who had

17. The jury would be warranted in so concluding, notwithstanding the fact that the plaintiff vigorously argued to the judge hearing her motion for sanctions, that without specific information from the Globe defendants as to the identities of their confidential sources, she could not successfully demonstrate whether officials at Dana-Farber had released confidential peer review information to Knox. (The judge indicated his agreement with that argument when he imposed the sanction of default judgments against the Globe defendants.) It is far less certain whether the jury could have attributed to Dana-Farber responsibility for leaking to the press information that the plaintiff was under investigation by the board of registration. It is not disputed that Dana-Farber (through Livingston

(Cont'd)

in no sense been a media figure until that time, was held up to the public eye in a manner that was exceedingly distressing to her.

Nevertheless, the disclosures were limited to the plaintiff's professional involvement in a matter that already was the focus of a high degree of public scrutiny and interest. This is a case where the plaintiff (unwillingly) achieved public figure status by reason of her status as chair and principal investigator of an experimental research protocol under which two patients at a prominent research institution received chemotherapy overdoses. See *ELM Med. Lab., Inc. v. RKO Gen., Inc.*, 403 Mass. 779, 786 (1989); *Jones v. Taibbi*, 400 Mass. 786, 801 (1987); *Peckham v. Boston Herald, Inc.*, 48 Mass.App.Ct. 282, 289 (1999). Accordingly, any dissemination of information regarding the plaintiff in connection with the overdoses, including documents which, under normal circumstances, would not be open to public inspection, only provided further publicity on a matter that was already squarely in the public eye. See Restatement (Second) of Torts, *supra* at comment b ("no liability [for invasion of privacy based on publicity given to true statements] when the defendant merely gives further publicity to information about the plaintiff that is already public"). We conclude that the disclosures about the plaintiff's professional conduct were part of a matter of intense public

(Cont'd)

as its spokesperson and physician-in-chief) publicly did announce that corrective action proceedings against two physicians had been initiated and did issue a press release summarizing, in redacted form, the findings of the Sallan committee. The plaintiff was not, however, identified by name in either of these public statements.

interest and were not, in any event, of an exceedingly personal or intimate nature, such as matters concerning her health or her lifestyle, to mention some examples. These considerations take the claim outside the protection of G.L. c. 214, § 1B. Although the challenged disclosures were embarrassing, the plaintiff cannot, as matter of law, establish the elements required for recovery under the statute.

b. *Breach of implied covenant of good faith and fair dealing.* Every contract in Massachusetts is subject, to some extent, to an implied covenant of good faith and fair dealing. See *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 473 (1991). This implied covenant may not be "invoked to create rights and duties not otherwise provided for in the existing contractual relationship," *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 441 Mass. 376, 385 (2004), but rather concerns the manner of performance. It has been explained that the implied covenant exists so that the objectives of the contract may be realized. See *Crellin Technologies, Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 10 (1st Cir.1994). The concept of good faith and fair dealing in any one context is shaped by the nature of the contractual relationship from which the implied covenant derives. The scope of the covenant is only as broad as the contract that governs the particular relationship.

In the context of employment, employers (in varying contexts and subject to strict limitations) have been held liable for breach of the implied covenant of good faith and fair dealing only in circumstances when an at-will employee has been terminated in bad faith. See *King v. Driscoll,* 424 Mass. 1, 6 (1996), citing *Fortune v. National Cash Register*

Co., 373 Mass. 96, 104 (1977); *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. 877, 881 (1982); *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 671 (1981), *S.C.*, 391 Mass. 333 (1984). There is no general duty on the part of an employer to act "nicely." Accordingly, to the extent that the plaintiff's claim rests on allegations that Dana-Farber dealt with her in a manner that was unfair by (to mention a few examples) withholding from her an autopsy report concluding that Lehman had suffered serious heart damage as a result of the overdose, failing to correct the Globe's initial misidentification of the plaintiff as a countersigner of the overdose order, deciding not to disseminate to the public the actual outcome of the corrective action proceedings (favorable to her), or generally, in the plaintiff's words, "singling [her] out . . . for 'scapegoat' treatment," the plaintiff did not present a claim on which she could recover.

The principal thrust of the plaintiff's implied covenant claim, however, is that Dana-Farber did not follow the procedure described in its own medical staff bylaws before restricting her clinical privileges. In the specific context of a physician-hospital employment relationship, we have assumed (but not yet decided) that a physician whose staff privileges have been terminated by a hospital may assert a claim of breach of the implied covenant of good faith and fair dealing against the hospital based on its alleged bad faith failure to follow its own bylaws. See *Birbiglia v. St. Vincent Hosp., Inc.*, 427 Mass. 80, 84 (1998). See also *Katz v. Children's Hosp. Corp.*, 33 Mass.App.Ct. 574, 576 (1992) (assuming that hospital's bylaws create contractual rights in physicians). Such a claim would be premised on the hospital's breach of its promise, implicit in the employment

relationship, to abide by its own bylaws in its conduct towards its physicians. See *Birbiglia v. St. Vincent Hosp., Inc., supra.*

Article 6 of the bylaws of the professional medical staff at Dana-Farber pertain to "corrective actions; adverse appointment and reappointment decisions; [and a physician's] rights of fair hearing." According to § 6.7 of the bylaws, a recommended corrective action that a physician's staff privileges be revoked, restricted, or modified entitles the affected physician to a panoply of rights in connection with a hearing on the matter. In circumstances (as were, apparently, present here) when a physician's clinical privileges are summarily restricted for over fourteen days in the absence of a recommendation by the corrective action committee, § 6.5 of the bylaws provides the affected physician with all of the rights provided by § 6.7, including a hearing and written notice of the right to request a hearing.[18]

---

18. Section 6.14 of the bylaws provides that the "proceedings, reports, records, findings, recommendations, evaluations, opinions, deliberations or other actions taken pursuant to this [art. 6], and the identity of and information provided by witnesses or any other individuals, shall be treated as confidential to the extent permitted by law and public regulations." The plaintiff's counsel argued at trial, in vague fashion ("All the conduct that I described earlier in connection with sex discrimination and retaliation also constitutes violation of that covenant"), that Dana-Farber violated the implied covenant of good faith and fair dealing in its employment relationship when it, through Livingston or another high ranking hospital official, released to the Globe internal peer review and other confidential information regarding the plaintiff, including information that corrective action proceedings had been initiated against her and that she had been reported to the board of registration. In her reply brief,

(Cont'd)

Appendix A

It is undisputed that the plaintiff did not receive a hearing before, or within fourteen days of, being assigned to administrative duties on March 31, 1995. Nor was the plaintiff formally notified, in writing, of her right to hearing. A copy of the bylaws was attached to the letter informing the plaintiff of the corrective action investigation against her, and the record suggests that the plaintiff was offered (and declined) the opportunity to speak before the committee deciding what, if any, corrective action was appropriate. Whether the plaintiff was entitled to request a hearing, and whether she received constructive notice and, thereafter, waived her entitlement to request a hearing was a matter to be argued to the jury. Based on their belief in the plaintiff's version of events, and a reasonable interpretation of the bylaws, the jury reasonably could have found that Dana-Farber had violated its own bylaws, and in doing so, violated the implied covenant of good faith and fair dealing in its employment contract with the plaintiff.

(Cont'd)

the plaintiff claims that the implied covenant was violated when Livingston "disclosed to the Globe the [c]orrective [a]ction proceedings concerning [the plaintiff] and said that the possibility of a cover-up (for which there was no evidence) was 'right smack in the bull's eye' of the internal investigation." We postpone comment on the assumption, underlying the latter claim, that it was Livingston who secretly informed Knox of the plaintiff's identity in connection with the corrective action proceedings. See note 29, *infra*. To date, the plaintiff has not argued the precise point that alleged improper disclosures on the part of Dana-Farber violated § 6.14 of its bylaws, and, thereby, constituted a breach of the implied covenant. Any claim to that effect, therefore, is waived. See Mass. R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975). See also *Foley v. Lowell Sun Publ. Co.*, 404 Mass. 9, 11 (1989).

Thus, we assume that Dana-Farber violated the implied covenant of good faith and fair dealing when it restricted the plaintiff's clinical privileges without first notifying her of her right to request a hearing. We conclude, nevertheless, that the judgment entered against Dana-Farber must be vacated, because the plaintiff has offered no evidence that she suffered compensable loss as a result of the breach. As has been stated, the plaintiff's clinical privileges, restricted in April, 1995, were fully restored in August of that year, after the committee concluded that an oral reprimand was the appropriate action to take. Our cases establish that, in awarding damages for breach of the implied covenant of good faith and fair dealing, the goal is to compensate an employee for past services and to deny the employer "any readily definable, financial windfall" resulting from the breach. *McCone v. New England Tel. & Tel. Co.*, 393 Mass. 231, 234 (1984), quoting *Gram v. Liberty Mut. Ins. Co., supra* at 335. See *King v. Driscoll, supra* at 5; *Maddaloni v. Western Mass. Bus Lines, Inc., supra; Fortune v. National Cash Register Co., supra.* Consistent with this principle, and keeping in mind that the plaintiff received all sums due her for her employment, Dana-Farber is liable neither for negative effects on the plaintiff's future career nor for the plaintiff's emotional distress. The only damages to which the plaintiff is entitled are for economic losses suffered as a result of the hospital's failure to provide written notice of her right to a hearing. Because the plaintiff has made no specific showing of such a loss, her allegations fall short of proving a claim.

c. *Retaliation in violation of G.L. c. 151B, § 4(4).* Based on the facts set forth in part 1.d of this opinion, a reasonable

jury could conclude that Dana-Farber's decision not to renew the plaintiff's appointment was motivated by retaliatory animus fueled by the plaintiff's filing of a lawsuit against Dana-Farber alleging discrimination based on gender.[19] The plaintiff had been forewarned by a STAMP team leader, as early as September, 1995, that proceeding with any legal action would "hurt her." A second STAMP team leader subsequently informed her that Dana-Farber would "squash [her] like a bug." Significantly, the day after the plaintiff removed her administrative complaint of discrimination to the Superior Court, she was told that clinical positions previously available for the upcoming fall were no longer available and, indeed, that no clinical positions would be available for the plaintiff. Suggestions that she should work at home and that she should complete her unfinished STAMP work could be, in the eyes of the jury, indicators of Dana-Farber's intention to punish the plaintiff for asserting her rights under G.L. c. 151B. Although the plaintiff continued to work at Dana-Farber for many months after this meeting, the message, that her employment future at the hospital was in jeopardy, had been conveyed.

---

19. We reject Dana-Farber's contention that it is entitled to judgment in its favor because of the plaintiff's failure to file her claim of unlawful retaliation with the MCAD. As is stated above, the plaintiff already had removed her discrimination claim to the Superior Court by the time she was notified that her reappointment would not be forthcoming. She subsequently amended her complaint to add the charge of retaliation. In these circumstances, she was not required to return to the MCAD to file a second complaint. See *Cuddyer v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 529 n. 8 (2001), and cases cited.

Appendix A

At trial, Dana-Farber characterized the decision to eliminate the plaintiff's position as one part of the hospital's cost-cutting reduction that included many people who had not engaged in protected activities under G.L. c. 151B, made in response to significant reductions in funding, including the loss of research funding for protocol 94-060. The record demonstrates that, of all the hospital employees let go as part of the hospital's "cost-cutting reductions," only one other employee was at the plaintiff's level, and the plaintiff was the only member of the STAMP team whose appointment was not renewed. Dana-Farber's contention that the plaintiff "did not suffer any adverse employment action in connection with the alleged retaliation" simply is not persuasive. Clearly, the jury felt so as well. The plaintiff's evidence easily meets the standard for proof of causation in retaliation claims under G.L. c. 151B. See *Abramian v. President & Fellows of Harvard College,* 432 Mass. 107, 114 (2000); *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination,* 400 Mass. 156, 168 (1987); *Carter v. Commissioner of Correction,* 43 Mass.App.Ct. 212, 224 (1997).

d. *Charitable cap.* The plaintiff claims error in the judge's application of the statutory cap under G.L. c. 231, § 85K, limiting the tort liability of a charitable entity at $20,000, to Dana-Farber's liability.

The question whether unlawful retaliatory conduct in the employment context falls within the scope of § 85 to shield charitable institutions from the full effects of liability under G.L. c. 151B has never been addressed by this court. In *Linkage Corp. v. Trustees of Boston Univ.,* 425 Mass. 1,

27- 28, cert. denied, 522 U.S. 1015 (1997), we held that § 85K does not apply to damages awarded under G.L. c. 93A because that statute created "broad new rights, forbidding conduct not previously unlawful under the common law of contract and tort or under any prior statute." We used the same reasoning in *Birbiglia v. Saint Vincent Hosp., Inc.*, 427 Mass. 80, 88 (1998), to hold that § 85K did not apply to a claim that a hospital violated G.L. c. 272, § 99 Q, the Massachusetts wiretapping statute. The United States Court of Appeals for the First Circuit has held that § 85K does not limit damages awarded under G.L. c. 151B. See *McMillan v. Massachusetts Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 307 (1st Cir.1998), cert. denied, 525 U.S. 1104 (1999). Following the reasoning of the *Linkage* case, the First Circuit concluded that G.L. c. 151B, like G.L. c. 93A, created rights that did not exist under the common law and, thus, claims under G.L. c. 151B were not to be considered "torts" for purposes of § 85K. See *id.* We agree and now hold that § 85K does not apply to limit damages awarded pursuant to a successful claim of unlawful retaliation under G.L. c. 151B.[20]

---

20. Our position is consistent with our interpretation of G.L. c. 258, § 2, the Massachusetts Tort Claims Act (Act), limiting liability of public employers for a "negligent or wrongful act or omission of any public employee acting within the scope of his office of employment" to $100,000. See *Jancey v. School Comm. of Everett*, 421 Mass. 482, 501 (1995), *S.C.*, 427 Mass. 603 (1998). In *Jancey*, this court held that the Act does not apply to an employee's wage discrimination claim because "even though wage discrimination 'has historical connections to common law tort and contract claims,' *Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220, 226 (1994), acts of discrimination—whether intentional or unintentional—do not thereby

(Cont'd)

Our holding finds substantial support in the legislative history, as well as the plain language, of both statutes. Up until the time that G.L. c. 231, § 85K, was enacted in 1971, a nonprofit hospital, such as Dana-Farber, enjoyed charitable immunity from tort liability. The statute abolished the defense of charitable immunity to "any cause of action based on tort" brought against a charitable corporation, but imposed a mandatory $20,000 limit on liability "if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation." The purpose behind the charitable cap was "to protect the funds [and other assets] of charitable institutions so they may be devoted to charitable purposes." *English v. New England Med. Ctr., Inc.*, 405 Mass. 423, 429, cert. denied, 493 U.S. 1056 (1990). We have enforced the cap as a "legislatively mandated limit on the amount of civil damages that can be recovered from a charitable corporation that causes harm by committing a tort in the performance of its charitable purpose, no matter how compelling the circumstances of the injured party." *Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 239 (2003). The plain language of the statute, however, could not be clearer. Section 85K applies only in limited circumstances where damages flow from a tort "committed in the course of any activity carried on to accomplish directly [a defendant's] charitable purposes." The charitable cap does not apply to most statutory

---

(Cont'd)

become torts." *Id.*, citing *Whitney v. Worcester,* 373 Mass. 208, 216 n. 10 (1977) ("The inquiry into governmental tort liability in a particular case must begin with a determination whether the conduct in question was in fact tortious").

violations, unless there is a "tort" within the meaning of the statute.[21]

We have, admittedly, referred frequently to tort-like aspects of claims of discrimination under G.L. c. 151B. See, e.g., *Stonehill College v. Massachusetts Comm'n Against Discrimination,* 441 Mass. 549, 559-560, cert. denied, 125 S.Ct. 481 (2004); *Thomas v. EDI Specialists, Inc.,* 437 Mass. 536, 539 (2002); *Dalis v. Buyer Advertising, Inc.,* 418 Mass. 220, 223 (1994); *Conway v. Electro Switch Corp.,* 402 Mass. 385, 387 (1988). It cannot be said, however, that claims arising under G.L. c. 151B are causes of action in tort. Chapter 151B is a comprehensive statute enacted to provide judicial and administrative remedies for destructive acts of discrimination in the workplace. When the statute was originally enacted, the Legislature specifically exempted charitable organizations from the category of "employers" who could be liable for G.L. c. 151B violations. The remedies provision contained in § 9 expressly states that it should be "construed liberally for the accomplishment of" the purposes of G.L. c. 151B and that "any law inconsistent with any provision [of G.L. c. 151B] shall not apply." In 1969, the Legislature removed G.L. c. 151B's charitable exemption and made charitable organizations "employers" subject to the same provisions and remedies as other employers for claims brought under that chapter. G.L. c. 151B, § 1(5), inserted by St. 1969, c. 216. Section 4(4) of G.L. c. 151B, thus, made it

21. Because we conclude that a violation of G.L. c. 151B is not a tort for purposes of G.L. c. 231, § 85K, we need not consider the statute's requirement that the tortious conduct complained of be committed within the scope of a defendant corporation's charitable purpose.

unlawful for a hospital employer, such as Dana-Farber, to "discharge, expel or otherwise discriminate against any person" because that person filed a complaint with the MCAD, two years before G.L. c. 231, § 85K, abolished charitable immunity as to causes of action "based on tort" but imposed the charitable cap on recovery "if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of the corporation." A fair reading of both statutes does not support the extension of the charitable cap to damages awarded for successful claims under G.L. c. 151B.[22]

e. *Damages as a whole.* This conclusion, coupled with our determinations, set forth in parts 2.a and 2.b of this opinion, that the verdicts against Dana-Farber for invasion of privacy and violation of the implied covenant must be vacated, leads us inevitably to conclude that there must be a new trial on damages to be assessed against Dana-Farber on the retaliation claim. The jury returned a special verdict as to each count but, despite requests by Dana-Farber, the jury was not asked to assess damages separately for each claim. The judge repeatedly instructed the jury that damages could not be duplicative (that caution was written on the verdict slip as well). In a written order on post-trial motions, however, the judge observed that "at all times it was assumed that the damages for all three causes of action [against Dana-Farber] were the same and that the claims were simply alternative forms of pleading based on the same set of facts." The plaintiff appears to concede the truth of the judge's

22. The question is not one, as argued by Dana-Farber, that may be addressed on a case-by-case basis.

observation. On this record it is impossible to ascertain the amount of damages the jury assessed for the retaliation claim.[23] In such a situation, with the damages on three claims (two of which are invalid, one of which is sound) awarded in an undifferentiated lump sum, there must be a new trial on damages.

3. *Claim against Livingston.* The jury found in the plaintiff's favor on her claim that Livingston wrongfully induced Dana-Farber not to extend her employment relationship. The plaintiff asserts that it was Livingston alone who conducted his own investigation into the overdose without asking the plaintiff her version of events or whether she had checked the chemotherapy dose administered to Lehman; failed to correct Knox's misidentification of the plaintiff as a countersigner of the overdose orders and confirmed to Knox that Dana-Farber was investigating a possible cover-up; initiated a corrective action investigation of the plaintiff's performance, but failed to notify her of the matter until after he had issued a press release on the subject; summarily assigned the plaintiff to research and administrative duties during the investigation; and sent a

---

23. At the time of the filing of her original complaint, the plaintiff already claimed that she had suffered damages as a result of the alleged invasion of privacy and breach of the covenant of good faith and fair dealing on the part of Dana-Farber. The retaliation claim, and any damages resulting from that retaliation, necessarily relate only to discrete events that occurred at the end of the sequence of events outlined at trial. The total damages awarded comprised damages flowing from the entire scenario, and, lacking any itemization from the jury, it is impossible to identify how much of that total is attributable to the acts of retaliation.

strongly worded letter to the committee, expressing his view that an oral reprimand of the plaintiff was insufficient. Livingston argues that the judgment entered against him is contrary to law. He asserts that, as Dana-Farber's physician-in-chief, he did "exactly what he should have done" and, moreover, would have been "seriously remiss" if he had failed to seek a peer review investigation of the plaintiff's performance and voice his opinion that an oral reprimand was insufficient. According to Livingston, "[i]t is a travesty of justice for [him] to be held liable because he did not shy away from his professional obligation to seek a peer review investigation of the plaintiff's failure to check for the possibility of overdoses."

We first address the threshold question of Livingston's immunity under State law.[24] General Laws c. 111, § 203 (*a*), directs that the bylaws of every licensed or public hospital, and the bylaws of all medical staffs, contain procedures whereby allegedly incompetent conduct, that could be harmful to patient care, shall be reported, investigated, reviewed, and resolved. Section 203 (*c*), in turn, provides that an individual or institution providing information, opinion, counsel or services to, or participating in, a medical

---

24. We decline to address Livingston's parallel claim of immunity under the so-called Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § § 11101 et seq. (1994), made in his brief, because we deem it waived. Although Livingston did cite the HCQIA in an earlier memorandum in this case submitted, jointly with Dana-Farber, in connection with a motion for a protective order, the citation was offered in an entirely different context, namely, in support of an argument that the protection afforded to peer review documents under the HCQIA had not heretofore been waived.

peer review committee "shall not be liable in a suit for damages by reason of having furnished such information, opinion, counsel or services or by reason of such participation." The statutory protection, however, only extends to individuals who "acted in good faith and with a reasonable belief that said actions were warranted in connection with or in furtherance of the function of said committee or the procedures required by this section." G.L. c. 111, § 203 (*c*). The statute, thus, protects a physician who, in good faith, provides information or an opinion against someone else in the professional context of peer review proceedings from thereafter being held liable in tort based on that participation. It follows that the medical peer review privilege does not extend to physicians who participate in bad faith.

It is precisely allegations of Livingston's bad faith that are at the heart of the plaintiff's intentional interference claim. As the judge instructed the jury, the specific elements which must be proved in order to establish a claim of intentional interference with an employment relationship are (1) an advantageous employment relationship; (2) the defendant's knowledge of such relationship; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff suffered economic harm as a result of the defendant's conduct. See *Wright v. Shriners Hosp. for Crippled Children,* 412 Mass. 469, 476 (1992), citing *G.S. Enters., Inc. v. Falmouth Marine, Inc.,* 410 Mass. 262, 272 (1991); *Comey v. Hill,* 387 Mass. 11, 19 (1982).

We focus on the requirement that the intentiona[1] interference be "improper in motive or means." We have observed with respect to this requirement that the propriety of an actor's motives, or conduct, in a particular setting necessarily depends on the attending circumstances, and must be evaluated on a case-by-case basis. See *G.S. Enters., Inc. v. Falmouth Marine, Inc., supra* at 273. In addressing the issue of an employee claiming a supervisor intentionally interfered with the employee's advantageous relationship with the employer, we stated that an employee's supervisor is "privileged to act as he did unless he acted out of malevolence, that is, with 'actual' malice." See *Boothby v. Texon, Inc.*, 414 Mass. 468, 487 (1993), quoting *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 663 (1981). In *Wright v. Shriners Hosp. for Crippled Children, supra,* a hospital's assistant director of nursing was fired, ostensibly, in retaliation for having pointed out, to a visiting survey team, certain problems at the hospital relating to communication and patient care. We held in *Wright* that the hospital administrator had a right to fire the plaintiff unless he did so "malevolently, i.e., for a spiteful malignant purpose unrelated to the legitimate corporate interest." *Id.* at 476, quoting *Sereni v. Star Sportswear Mfg. Corp.*, 24 Mass.App.Ct. 428, 432-433 (1987).[25]

---

25. As the alleged events underlying the plaintiff's claim unfolded, Livingston resigned as Dana-Farber's physician in chief. See note 15, *supra.* Livingston arguably would no longer have been deemed the plaintiff's superior at the hospital, for example, at the time he wrote his July 12, 1995, letter regarding the recommendation of the committee. We discount any suggestion that the change in Livingston's employment position at Dana-Farber is relevant to our resolution of the claim.

We need not decide whether the evidence presented by the plaintiff at trial, reviewed under the proper standard, see *Boothby v. Texon, Inc., supra* at 470, was sufficient to support a finding that Livingston's challenged conduct was malevolent, or that he acted out of spiteful malignant purpose.[26] Livingston argues that the verdict against him was tainted by the improper admission in evidence of confidential peer review documents. We agree.

We have discussed the statutory mandate set forth in G.L. c. 111, § 203 (*a*), that bylaws of hospitals and their medical staffs contain procedures for medical peer review proceedings, and the provisions of immunity from tort liability set forth in § 203 (*c*) for those who participate in such proceedings in good faith. Subsequent sections of G.L. c. 111 address a related aspect of medical peer review proceedings, namely, the treatment of documents and records generated in the medical peer review context. Section 204 (*a*) directs that proceedings, records, and findings of medical peer review committees "shall be confidential and .. . shall not be subject to subpoena or discovery, or introduced into evidence" and "no person who was in attendance at a meeting of a medical peer review committee shall be permitted or required to testify in any . . . judicial or administrative proceeding [except those of the boards of registration, social work, or psychology]."[27] "The medical profession has

26. Evidence warranting such a finding would, presumably, also suffice to satisfy the bad faith exception to the statutory immunity for any expressions of opinion or conduct on Livingston's part that fell within the scope of G.L. c. 111, § 203 (*c*).

27. General Laws c. 111, §§ 204 (*b*) and (*c*), define (Cont'd)

historically regulated itself through internal hospital disciplinary proceedings designed to identify and remedy instances of substandard care." *Carr v. Howard,* 426 Mass. 514, 517 (1998). In 1986, the Legislature enacted G.L. c. 111, § § 203 and 204, St.1986, c. 351, § 9, to bolster the effectiveness of medical peer review by providing a "measure of confidentiality to the work of medical peer review committees." *Id.* at 518. See *Beth Israel Hosp. Ass'n v. Board of Registration in Med.,* 401 Mass. 172, 182-183 (1987) (statutory privilege of confidentiality "designed to foster aggressive critiquing of medical care"). Physicians would be far less willing candidly to report, testify about, and investigate concerns of patient safety if their actions would be subject to later scrutiny and possible litigation.

At every stage of the case, Dana-Farber and Livingston sought unsuccessfully to protect the confidentiality of peer review proceedings that gave rise to the plaintiff's claims. First, Dana-Farber and Livingston filed an emergency motion to impound the case file. Their motion was denied by a judge, and the denial was affirmed by a single justice of the Appeals Court. Next, Dana-Farber and Livingston moved for a protective order to bar discovery of confidential medical peer review proceedings, reports, and other hospital records. That motion was denied, by the same judge, without prejudice, and the denial was affirmed by a single justice of the Appeals Court. Dana-Farber and Livingston filed a petition for

---

(Cont'd)

circumstances under, and the extent to, which peer review documents may be disclosed and peer review committee witnesses and members may be questioned concerning peer review activities. None are present here.

relief from the judge's denial of their motion, pursuant to G.L. c. 211, § 3, with a single justice of this court, who declined to intervene. On its renewal later in the case, the motion for a protective order again was denied, this time on the grounds that Dana-Farber had waived the confidentiality provisions of G.L. c. 111, § 204, when it shared the documents with the plaintiff.[28]

The plaintiff's claim of intentional interference against Livingston centered on the role he played in the corrective action proceedings. This role was memorialized in two letters written by Livingston: (1) his March 31, 1995, letter requesting that corrective action proceedings be initiated against the plaintiff in order to "evaluate [the plaintiff's]

---

28. This determination was incorrect. That Dana-Farber chose to share certain peer review documents with the plaintiff cannot constitute a waiver of the statutory bar against their use at trial against Livingston. See *Miller v. Milton Hosp. & Med. Ctr., Inc.*, 54 Mass.App.Ct. 495, 501 (2002). "The peer review privilege does not rest on its threshold confidentiality as between the parties to the litigation [as does, for example, the attorney-client privilege], but instead is designed to foster a candid exchange of information regarding the quality of medical care." *Id.* See *Commonwealth v. Choate-Symmes Health Servs.*, 406 Mass. 27, 28-29 (1989) (narrowly construing exception to statutory language barring procurement of peer review committee records for use in judicial or administrative proceedings). In our view, applying waiver principles to peer review communications would significantly undermine the effectiveness of the statute. Physicians could hardly be expected to volunteer information, or express honest opinions, if the confidentiality of their comments could be waived after the peer review process were completed, and, as here, their participation used as evidence in a lawsuit against them.

clinical competence, judgment and sense of responsibility to her patients and colleagues;" and (2) his subsequent letter, dated July 12, 1995, regarding the recommendation of the committee, in which he expressed his view that an oral reprimand was an insufficient response for the plaintiff's "gross lack of insight and oversight." Dana-Farber and Livingston moved to bar the plaintiff from introducing all documents in connection with the corrective action proceedings at trial. Deferring to the prior rulings of the motion judge, the trial judge denied this motion. During the trial, both letters were admitted in evidence over Dana-Farber's and Livingston's continuing objections.

As conceded by the plaintiff, in her original complaint and again in her amended complaint, both the corrective action proceedings and the Sallan committee proceedings were confidential peer review proceedings protected by G.L. c. 111, § 204. It follows that the "proceedings, reports and records" of both committees fell within § 204 (*a*)'s protection from "subpoena or discovery, or introduc[tion] into evidence." The scope of the language "proceedings, reports and records" is defined expansively in G.L. c. 111, § 205 (*b*), which provides that "[i]nformation and records . . . which are necessary to the work product of medical peer review committees .. . shall be deemed to be proceedings, reports or records of a medical peer review committee for purposes of [§ 204]."

We reject the plaintiff's contention that Livingston's July 12 letter regarding the recommendation of the committee fell outside of the scope of the corrective action proceeding and, thus, does not constitute privileged peer review. As has

been stated, art. 6 of Dana-Farber's medical staff bylaws set forth the procedures for corrective action, or medical peer review, proceedings. Section 6.4.4 of the bylaws expressly provides that the initiator of a request for corrective action (here, Livingston) is entitled to respond, in writing, to a recommendation by the committee of a corrective action that does not require a hearing (as here, when the committee recommended only an oral reprimand), and the board, in its discretion, may consider any new or additional information provided in such a response. We conclude that the letter containing the initiator's response to the committee's preliminary recommendation, as well as the actual letter initiating the peer review proceedings, both were submitted as part of the peer review process provided for in Dana-Farber's medical staff bylaws, and are the type of documents that are "necessary to the work product of medical peer review committees." *Carr v. Howard, supra* at 531 (applicability of § 204 to particular documents may be determined from purpose and process from which it emerged). The admission of the letters was error.

Without the letters, the plaintiff's evidence against Livingston generally concerned his failure to inquire into the plaintiff's version of events in the days following the discovery of the overdoses; his decision to assign the plaintiff to "administrative duty," thereby suspending her clinical privileges, and thereby causing her to be reported to the board of registration; and his failure to support the plaintiff when she was publicly maligned in the Globe.[29] That evidence may

29. The plaintiff alleges that Livingston may have been Knox's "confidential source" at Dana-Farber who had supplied her name in (Cont'd)

have warranted findings that Livingston's attention was inordinately focused on the plaintiff's culpability. It clearly would not have warranted, however, an inference that the misplaced focus was deliberate, or motivated by a "spiteful, malignant purpose" to hurt the plaintiff that was unrelated to his professional responsibilities. His apparent motive was to seek out any perceived wrongdoers. See *United Truck Leasing Corp. v. Geltman,* 406 Mass. 811, 817 (1990). We conclude that the plaintiff's allegations of Livingston's bad faith cannot support a jury finding against him under the standard stated in *Wright v. Shriners Hosp. for Crippled Children,* 412 Mass. 469, 476 (1992). See *Gram v. Liberty Mut. Ins. Co.,* 384 Mass. 659, 664 (1981), *S.C.,* 391 Mass. 333 (1984) ("The line between a proper inference and unwarranted conjecture is not easily drawn. The answer depends on the evidence in each case and on what the trier of fact may reasonably infer from that evidence").

4. *Counts against the Globe defendants.* As was explained at the outset of this opinion, during the discovery stage of the litigation, the plaintiff sought to compel the Globe defendants to reveal the identities of sources consulted before publishing the series of articles that formed, in large part,

---

(Cont'd)

connection with the announced corrective action proceedings, or who had passed Knox a copy of the hospital's highly confidential Sallan committee synopsis. The plaintiff also suggests that Livingston may have secretly provided to the board of registration a copy of his July 12 letter responding to the committee's corrective action recommendations. These allegations are without support in the record and far too speculative to form a basis for a finding of improper motive.

the basis of the plaintiff's libel and privacy claims against Dana-Farber and the Globe defendants. Specifically, the plaintiff sought the identities of Knox's sources who disclosed (1) that the plaintiff was the subject of a Dana-Farber internal "corrective action" investigation; (2) that the plaintiff was the subject of an investigation by the board; and (3) information contained in the synopsis of the Sallan committee and Dana-Farber's response. The plaintiff also sought the identity of the person, or persons, who informed Knox of his mistake in naming the plaintiff as a countersigner of the overdose orders. The judge concluded that the identities of Knox's confidential sources were central to the plaintiff's libel claims against the Globe defendants and against Dana-Farber and her intentional infliction of emotional distress claims against Knox. Accordingly, the judge denied the Globe defendants' motion for a protective order and granted the plaintiff's motion to compel.[30] On the Globe defendants' refusal to comply with the discovery order, the judge entered a judgment of civil contempt against the Globe defendants and imposed, as a monetary sanction, a series of escalating fines.

The Appeals Court vacated the judgment and remanded the case to the Superior Court for findings and conclusions that would justify the entry of sanctions.[31] See *Ayash v. Dana-*

30. The Globe defendants petitioned for interlocutory relief of the disclosure order, pursuant to G.L. c. 231, § 118, first par., from a single justice of the Appeals Court, who denied the petition.

31. By the time the Appeals Court heard the case, the Globe defendants had been granted partial summary judgment on the plaintiff's privacy claim against them.

Farber Cancer Inst., 46 Mass.App.Ct. 384, 392-393 (1999). On remand, the plaintiff renewed her motion to compel the disclosure of confidential sources. One confidential source (a physician who had alerted Knox to his misidentification of the plaintiff as the overdose order countersigner) had by this time come forward, and the plaintiff no longer needed to know that person's identity in order to pursue her libel claims. The plaintiff argued, however, that the identities of other confidential sources were necessary in order to pursue her claims against Knox for intentional infliction of emotional distress and against Dana-Farber for invasion of privacy and for breach of the implied covenant of good faith and fair dealing. The judge (the same who had issued the vacated orders) performed the appropriate balancing test and determined that the plaintiff's need for the information in order to pursue her claims against Knox and Dana-Farber was "tangible and substantial and outweigh[ed] the public interest in protecting the free flow of information." See *Sinnott v. Boston Retirement Bd.*, 402 Mass. 581, 586-587, cert. denied, 488 U.S. 980 (1988). Accordingly, the judge granted the plaintiff's renewed motion to compel the Globe defendants to disclose the identifies of their confidential sources. An order to disclose was entered on October 21, 1999. When the Globe defendants continued to refuse to reveal the purported "confidential sources," or any information which would lead to their identities, the plaintiff filed a motion to compel Knox to answer one interrogatory. The judge allowed the motion and ordered Knox to answer the interrogatory, by or before June 10, 2000. This second order was entered on June 13, 2000. Knox (together with his Globe editor) still refused to reveal his sources.

Appendix A

The plaintiff filed a motion for the imposition of sanctions pursuant to Mass. R. Civ. P. 37(b)(2), as amended, 390 Mass. 1208 (1984). The judge allowed the plaintiff's motion and ordered, as a sanction pursuant to rule 37(b)(2), that judgments of liability enter in favor of the plaintiff on all of her remaining claims against the Globe defendants.[32]

a. *Merits of the sanction.* We review the imposition of sanctions under the well-established abuse of discretion standard. See *Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 235 (2003); *Roxse Homes Ltd. Partnership v. Roxse Homes, Inc.*, 399 Mass. 401, 404 (1987); *Riley v. Davison Constr. Co.*, 381 Mass. 432, 441 (1980).

In his written memorandum and order, the judge found that the Globe defendants' ongoing refusal to comply with the October 21, 1999, and June 13, 2000, discovery orders constituted a contempt, as well as a violation of the court's orders, and that the Globe defendants' conduct fell within the scope of rule 37(b)(2). The judge reasoned that the earlier order of contempt and imposition of monetary sanctions had not succeeded in securing the Globe defendants' compliance with the discovery orders and, as a result, the alternate authorized sanction of default judgment was warranted. The judge noted that the noncompliance of the Globe defendants had inflicted an "injustice" on the plaintiff's right to discovery in her case against Dana-Farber and Livingston. The judge

32. The judge also ordered, as a sanction pursuant to Mass. R. Civ. P. 37(b)(2), as amended, 390 Mass. 1208 (1984), that the Globe defendants pay reasonable attorney's fees and costs incurred by the plaintiff because of the Globe defendants' failure to comply with the October 21, 1999, and the June 13, 2000, orders.

stated his view that the imposition of a default judgment, by itself, would not adequately serve "[t]he interests of justice" because the Globe defendants' refusal to disclose may also "effectively protect [Dana-Farber] and . . . Livingston from liability in this action," thus constituting an "ongoing, but imminently avoidable, harm" to the plaintiff. The judge characterized the Globe's conduct a "unilateral[ ] and unnecessar[y] interupt[ion to] the free flow of information that may be critical to [the plaintiff.] It is ironic that the Globe defendants' conduct may serve to effectuate the interests of the very hospital, as well as the hospital's former chief executive, where the Boston Globe's own reporter was treated and died. It is not a legacy of which the Globe defendants should be proud." The judge's order was within his discretion.

At the time of the judge's ruling, the overdose incidents had occurred over six years previously. There is nothing in the record to suggest that Knox continued to receive or collect information pertaining to the overdoses from these sources that would justify the continued concealment of their identities. The judge concluded that their identities, and information that they potentially could reveal, bore directly on the plaintiff's claims against Knox and Dana-Farber. Given the current posture of the case, including the jury's verdict in favor of Dana-Farber and Livingston on the libel claim and our conclusions that the plaintiff's evidence did not support claims against Dana-Farber for invasion of privacy, see part 2.a and note 17, *supra,* or against Livingston for intentional interference, see part 3, *supra,* it might be tempting to take issue with the judge's apparent view of the strength of the plaintiff's need to know the identities of Knox's sources, and, with the clarity granted by hindsight,

express our opinion that the identities of any confidential sources were, in the end, peripheral at best to the plaintiff's case. We decline to do so.

At the heart of the plaintiff's case were her intertwined assertions that officials at Dana-Farber were intentionally "scapegoating" the plaintiff, at the same time that the Globe and Knox were intentionally "spotlighting" her for public censure. The plaintiff had the right to know whether it had been an agent of Dana-Farber (or, possibly, Livingston himself) who had divulged confidential information to the Globe, as well as the full extent of connections between Knox and officials at Dana-Farber. As a result of the Globe defendants' refusals to comply with the discovery orders, the plaintiff lost her opportunity to proceed against the defendants on a theory of joint and several liability. Knowledge of who (if anyone) at Dana-Farber had spoken to Knox, and exactly what had been said, could have allowed the plaintiff to bolster her asserted claims or to add new ones.

Over a period of years, the judge had ordered the Globe defendants to comply with the plaintiff's requests for discovery of this information, to no avail. The Globe defendants made a deliberate choice to protect Knox's sources and to forgo their (potentially meritorious) defenses to the claims asserted against them rather than obey the judge's orders.[33] The judge was not trying to punish the Globe

33. This is clearly not a case where the Globe defendants were unable to comply with the orders. We do not suggest that their refusals to obey the discovery orders were in bad faith. Despite their assertions to the contrary, however, the Globe defendants had no special (Cont'd)

defendants. He clearly felt that he had no alternative method of enabling the plaintiff to obtain the information she needed, and he left open to the Globe the option to remove the default by complying. The question for our review is whether the judge's order constituted an abuse of the "broad measure of discretion" afforded him. See *Sinnott v. Boston Retirement*

(Cont'd)

constitutional or statutory testimonial privilege, based on their status as a newspaper publisher or reporter, that would justify their refusal to obey the orders. See *In the Matter of John Doe Grand Jury Investigation,* 410 Mass. 596, 598 (1991) (*Doe*); *In the Matter of Roche,* 381 Mass. 624, 636, citing *Herbert v. Lando,* 441 U.S. 153 (1979) (Powell, J., concurring). We have recognized that values underlying the First Amendment to the United States Constitution and art. [illegible] of the Amendments to the Massachusetts Constitution may give rise to a common-law privilege that would allow a news reporter to refuse to reveal his sources. See *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information,* 395 Mass. 164, 172 (1985) (*Petition*). In deference to the effect that compelled discovery has on free speech, and to avoid the "needless disclosure of confidential relationships," *In the Matter of Roche, supra* at 637, our cases require a judge ruling on discovery requests, on a showing that "the asserted damage to the free flow of information is more than speculative or theoretical," to conduct a balancing test between "the public interest in every person's evidence and the public interest in protecting the free flow of information." *Petition* at 172. See *Doe, supra; Sinnott v. Boston Retirement Bd.,* 402 Mass. 581, 586, cert. denied, 488 U.S. 980 (1988). As has been stated above, the judge carefully performed that balancing test and properly concluded that, in this case, the plaintiff's need for the requested information outweighed the public interest in the protection of the free flow of information to the press.

Bd., 402 Mass. 581, 585, cert. denied, 488 U.S. 980 (1988). We conclude that it did not.[34]

b. *Damages against Globe defendants.* The only issue for the jury at trial with respect to the Globe defendants was what amount of damages, if any, the conduct for which they were held liable caused to the plaintiff. We are aware of the general rule that a reviewing court should not disturb a jury's award of damages unless it is clearly excessive in relation to what the plaintiff's evidence has demonstrated damages to be. See *Labonte v. Hutchins & Wheeler,* 424 Mass. 813, 824 (1997); *Robertson v. Gaston Snow & Ely Bartlett,* 404 Mass. 515, 520, cert. denied, 493 U.S. 894 (1989); *Bartley v. Phillips,* 317 Mass. 35, 40-41 (1944). We are also aware that appellate judges have a special duty in reviewing verdicts in defamation cases, "[b]ecause of constitutional considerations, and the potential difficulties in assessing fair compensation." *Stone v. Essex County Newspapers, Inc.,* 367 Mass. 849, 861 (1975). A plaintiff in a successful defamation case is entitled only to fair compensation for actual damages, including emotional distress and harm to reputation (and any special damages which have been pleaded and proved). See *Tosti v. Ayik,* 394 Mass. 482, 496 (1985), *S.C.,* 400 Mass. 224, cert. denied sub nom. *United Auto Workers, Local 422 v. Tosti,* 484 U.S. 964 (1987).

34. The first disclosure order was entered in October, 1999. In November, 1999, the Globe defendants filed motions for summary judgment seeking dismissal of the plaintiff's remaining claims against them. The second disclosure order was entered in June, 2000. The judge did not err in failing to address the pending summary judgment motions before resolving the discovery issues. The plaintiff was entitled to adequate discovery before litigating the summary judgment motions.

The theme of the plaintiff's case was that the Globe defendants "improperly spotlighted" her and that Dana-Farber and Livingston (the medical defendants) "improperly scapegoated" her. In her memorandum and order on the posttrial motions of the parties, the judge summarized the plaintiff's theory with respect to damages against all defendants as "the defendants' actions that caused damage to the plaintiff, although based on different and separate legal theories, operat[ing] on [ ] parallel course[s]." We agree with this assessment. As has been stated, the jury determined that joint and several liability was not applicable. Of the total damages awarded the plaintiff, the jury awarded $2,100,000 against the Globe defendants and $2,100,000 against the medical defendants. Against each set of defendants, the jury's total award reflected identical sums for economic damages ($300,000) and for emotional distress damages ($1,800,000). It appears that the precisely equivalent apportionment of damages between the medical defendants and the Globe defendants was deliberate.[35] There is no indication, however, that the controlling damages principles were not correctly applied. Further, unlike the claims against Dana-Farber, the Globe defendants, by reason of the default judgment, were liable on all claims made by the plaintiff and the damages flowing from their wrongdoing. The issue present in the assessment of damages against Dana-Farber, therefore, is not present in the case against the Globe defendants.

---

35. It is likely that the jury decided on a total monetary figure necessary fairly to compensate the plaintiff for injuries caused by the defendants' combined actions. Then, based on their conclusion that the medical defendants and the Globe defendants were equally to blame (although not jointly liable), the jury could have apportioned damages for economic loss and emotional distress damages in precisely equivalent amounts between the two sets of defendants.

Appendix A

The judge's general instructions to the jury on damages (which drew no objection that is relevant here) clearly explained that compensatory damages must be calculated to compensate the plaintiff for her losses, based with reasonable certainty on the evidence, only for harm caused by the wrongful conduct, and that damages may not be duplicative. The judge cautioned the jury that damages must be attributed to the defendant who inflicted them and instructed the jury on joint and severable liability. We must presume that the jury assessed damages, separately but in equal measure, against the medical defendants and the Globe defendants in accordance with the judge's instructions. See *Mailman's Steam Carpet Cleaning Corp. v. Lizotte,* 415 Mass. 865, 870 (1993).

Although the damages awarded the plaintiff for the defaulted claims against the Globe defendants may appear high, they were based on evidence that the Globe articles impugning the plaintiff affected her career[36] and caused her a great deal of emotional and psychological anguish. The plaintiff, who had enjoyed much success in her work at Dana-

36. We reject the Globe's assertion that the $300,000 award for lost compensation and injury to the plaintiff's business reputation ($240,000 assessed against the Globe and $60,000 against Knox) is unjustified because the plaintiff failed to show that these losses were caused by the Globe defendants. Apart from instructing the jury, generally, that compensatory damages must be calculated to compensate a plaintiff only for harm caused by the wrongful conduct, the judge also cautioned the jury to "attribute the damages to the people who caused them" so that "you are not holding one defendant liable for harm inflicted by another." There is no reason to believe that the jury did not understand the distinction between the two sets of defendants.

Farber that combined both clinical and research aspects, looked forward to a bright future in her field of breast cancer research. She eventually was forced to accept employment, at a hospital in another State, that involved clinical work only. By June, 1995, three months after the original article naming the plaintiff appeared in the Globe, a psychiatrist and fellow physician at Dana-Farber became concerned that the plaintiff might harm herself, wondered whether she was fit to work, and suggested that she see a psychiatrist. The plaintiff thereafter received weekly treatment, from August, 1995, until September, 1996, from Dr. Mary Ann Badaracco. Dr. Badaracco testified that the plaintiff suffered from an "adjustment disorder with depressive features" and was particularly troubled by Globe articles that the plaintiff perceived to be unfair. Dr. Badaracco's testimony was confirmed by several of the plaintiff's colleagues and a trained social worker, who found the plaintiff to be in a state of crisis or trauma. A colleague and friend observed that the plaintiff was "very depressed" and "very anxious." Her sister testified that the plaintiff became a different person from the one she was before March 23, the day that the first article, naming the plaintiff, appeared in the Globe.[37] The plaintiff began to eat a lot, gained weight, and could not sleep. She cried frequently and would break down at family gatherings.

The above observations were independently confirmed at trial, through testimony of an expert forensic psychiatrist,

37. The plaintiff's sister also testified that Knox paid an unannounced visit to the plaintiff's home at approximately 9 P.M. one evening. The sister, who was there alone at the time, testified that the plaintiff was "very upset and crying" when told of the incident.

Dr. Thomas G. Gutheil, who had extensively interviewed the plaintiff and examined her records. Dr. Gutheil testified to a series of events, including the Globe coverage and the publicity focused on her, that made the plaintiff feel personally singled out and blamed. Dr. Gutheil testified that these events had "serious mental effects" on the plaintiff, who suffered "severe" emotional distress and a "sense of devastation," and was in "mental pain or psychological pain and discomfort for most of [the] time." In Dr. Gutheil's opinion, a key injury to the plaintiff was "the impact to her reputation from being published in nationally available sources." He stated his view that the plaintiff suffered a "really devastating loss, really at the core of her identity." The judge found no basis on which to overturn the awards as excessive, and neither do we.[38]

5. The first paragraph of the amended judgment entered on October 15, 2003, is vacated. That paragraph is to be replaced with a further amended partial judgment finding the defendant Dana-Farber liable to the plaintiff on her claim for retaliation under G.L. c. 151B, finding the defendant Dana-Farber liable for attorney's fees in the sum of $391,340.80, with interest from September 23, 2002, and

---

38. At trial, the plaintiff introduced evidence that the Globe's correction of Knox's inaccurate statement of March 23, 1995, that the plaintiff had countersigned the overdose orders, was not published until June 4, 1995. The judge properly instructed the jury, as requested by the Globe defendants, that they could consider the retraction of a libel statement as a factor in mitigating damages. See *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 860-861 (1975). There is no support for the Globe's assertion that the evidence may have impermissibly invited a punitive damages award.

costs in the amount of $27,284.85,[39] finding the defendant Livingston not liable to the plaintiff, finding the Globe defendants liable to the plaintiff on all of her claims against them, and finding the Globe defendants liable for damages in the sum of $2,100,000, and costs in the amount of $8,959.84.[40] There is to be a new trial to assess the plaintiff's damages against Dana-Farber (without regard to the charitable cap set forth in G.L. c. 231, § 85K). The final two paragraphs of the amended judgment (neither of which are at issue in this appeal) are affirmed.

So ordered.

---

39. In her brief, the plaintiff requests an award of additional attorney's fees and costs related to this appeal. She is entitled to such an award, based on the time and funds reasonably expended on the success of her G.L. c. 151B claim. Pursuant to the practice recently announced in *Fabre v. Walton,* 441 Mass. 9, 10-11 (2004), the plaintiff should file with the clerk of this court her application for fees and costs, together with any supporting materials, within fourteen days of the rescript from this court. Dana-Farber will have thirty days to respond to that submission. This court then will enter an appropriate order.

40. Because we affirm the default judgments against the Globe defendants, we do not disturb the order, entered November 6, 2001, that they reimburse the plaintiff for attorney's fees, costs, and expenses incurred in connection with her efforts to secure their compliance with the discovery orders entered October 21, 1999, and June 13, 2000, in the amount of $27,781.70. See note 32, *supra.*

APPENDIX B — ORDER ON POST-TRIAL MOTIONS OF ALL PARTIES OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED AUGUST 28, 2003

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-0565E

LOIS AYASH, M.D.,

Plaintiff

V.

DANA-FARBER CANCER INSTITUTE,
DAVID M. LIVINGSTON,
THE BOSTON GLOBE, and
RICHARD KNOX,

Defendants

ORDER ON POST-TRIAL MOTIONS OF ALL PARTIES

A hearing on post-trial motions filed by all defendants was held in March of this year. While the Court was considering the briefs and arguments made by all counsel, and working on this memorandum and order, two new decisions[1] on G.L. c. 231, § 85K, the so-called charitable

1. *Keene* v. *Brigham & Women's Hospital. Inc.*, 439 Mass. 223 (2003) and *Conners* v. *Northeast Hospital Corp.*, 439 Mass. 469 (2003).

immunity statute, an issue in the case, were issued by the Supreme Judicial Court. This Court requested supplemental memoranda from the Dana-Farber Cancer Institute (DFCI) defendants and the plaintiff[2] on the applicability, if any, of these decisions to the arguments made by both counsel in their papers and in open court. These supplemental filings were received by the Court on June 13, 2003.

Having considered the recent filings, as well as the original filings and oral arguments, the Court rules and orders as follows.

A. The Motion of DFCI and David M. Livingston to Correct the Judgment

Having reviewed the judgment against DFCI and David Livingston, the Court is persuaded that the judgment of August 13, 2002, Part (A), in the sum of $1,260,000.00 with interest from February 1, 1996 is in error and should be corrected so as to be against Dana-Farber Cancer Institute (DFCI) only. The three claims of retaliation, invasion of privacy, and breach of implied covenant of good faith and fair dealing were made against DFCI only, and the judgment should not have made the award a joint one with defendant David Livingston.

After consideration of the cases and supplemental memoranda, the Court also concludes that G.L. c. 231, § 85K, applies to the jury verdict awarded on the three claims

2. The Court did not request supplemental memoranda from the Globe defendants because the issue of charitable immunity did not affect the judgments against the Boston Globe or Richard A. Knox.

referenced above against DFCI only. I am persuaded that the two statutory claims (G.L. c. 151B, and 214, § 1B) are tort-like and the implied covenant claim is more like a breach of implied warranty claim, also a tort-like concept, than a strict breach of contract claim. All of the cases on charitable immunity, and particularly the recent *Keene* and *Conners* decisions, make it clear that the immunity statute is to be interpreted broadly, not narrowly. Otherwise, the charitable entity's ability to fulfil its charitable purpose would be chipped away by damage judgments. As the Appeals Court noted in *St. Clair* v. *Trustees of Boston University*, 25 Mass. App. Ct. 662 (1988) a case involving the question of whether intentional torts were covered by the doctrine, the purpose of the statute is to avoid diverting "funds devoted to the relief of suffering humanity . . . to payment of claims wholly foreign to the purposes of the public trust." (at 668). Massachusetts has applied the doctrine in numerous cases involving negligence of the charity's own employees (citations omitted), to claims alleging negligence in the selection of employees, *Rosen* v. *Peter Bent Brigham Hospital*, 235 Mass. 66 (1920), and to claims relating to the discussion of former employees with prospective employees. *St. Clair* v. *Trustees of Boston University*, supra. In this case, it would be contrary to the purpose of the charitable immunity statute to allow recovery for breach of the implied agreement to deal with employees fairly, a tort-like concept, since at all times it was assumed that the damages for all three causes of actions were the same and that the claims were simply alternative forms of pleading based on the same set of facts.

I also conclude that all of the activities which were the subject of plaintiff's complaints were performed in the course

of activity carried on to accomplish the charitable purposes of DFCI. A charity such as DFCI cannot operate without employees to treat its seriously ill patients and to perform the continuing research necessary to discover treatments for the devastating effects which cancer inflicts on patients. Plaintiffs unsupported assertion that the activities complained of come under the rubric "primarily commercial in character" is simply not persuasive.

Part (B) of the judgment against Dr. Livingston only remains as stated in the judgment docketed on August 13, 2002.

B. The Motions of all Defendants for New Trial and/or Remittitur Based on Damages Awarded

All defendants argued that the emotional distress damages were excessive. In addition, they argued that the economic damages were not based on the evidence, and the Globe defendants argued that they were duplicative. The Court rejects all these claims.

1. Emotional Distress Damages

All defendants argued that the emotional distress damages were excessive. With respect to these damages, although they were extremely generous, the Court does not believe they warrant a remittitur or justify a new trial. Unlike the case of *Labonte* v. *Wheeler*, 424 Mass. 813 (1997), relied on by the defendants, there was evidence here from two psychiatrists that Dr. Ayash was clinically depressed as a result of the actions of the defendants. The jury could have

found that her entire professional and personal life was totally disrupted by the events at DFCI, the articles that appeared in the Boston Globe, and the actions of Richard Knox. As a result, Dr. Ayash left a very close-knit family, many friends, and everything familiar to her and moved to a different part of the country where she had no support system in place to start all over again. The jury could believe that her confidence was shaken, her pride in her work and her self-esteem destroyed. The jury placed a high monetary value on the resulting emotional distress, having considered the evidence and applying the Court's instructions on the components of emotional distress damages.

The Court finds support for its decision in the recent case of *Borne* v. *Haverhill Golf & Country Club, Inc.*, 58 Mass. App. Ct. 306 (2003). As the Appeals Court noted there, jurors are uniquely qualified to assess the emotional damage 'incident to being placed in a second-class citizen status, made to feel inferior, socially ostracized, and demeaned in public" (at 320). That case was about golf; this case was about a talented physician's loss of her star status as a cancer researcher, her loss of a career path that was her dream, as well as the loss of her entire familial and emotional support system. This court believes that the jury carefully evaluated the emotional distress caused to Dr. Ayash by the treatment she received from the defendants and awarded her what they, from various walks of life and a variety of experience, believed to be fair and reasonable. The Court finds no basis to remit these damages or order a new trial on the ground that the emotional distress damages were excessive.

Appendix B

2. Economic Damage

The Court finds that the economic damages were based on the evidence. They were not excessive and they were not duplicative. As against the DFCI defendants, there was evidence to enable the jury to find that Dr. Ayash lost opportunities for promotion by having to start anew at the University of Michigan. There she is not on a tenure track, although she is receiving a good salary. The jury could also find that she will not attain the compensation level and prestigious standing she could have hoped to obtain at the Harvard Medical School and its teaching hospitals. As to her professional reputation, there was evidence that her professional standing was damaged by the treatment she received from her superiors and her colleagues. Finally, the damage awards for economic loss are not duplicative as against DFCI and Dr. Livingston. The jury was instructed several times during the Court's charge as well as on the verdict slip itself that they could not award damages more than once for the same injury. The jury made intelligent sense of the verdict slip and the evidence, and the verdicts do not show that the jury engaged in duplication. They answered the questions asked and awarded separate and different amounts against DFCI and Dr. Livingston. Finally, when faced with the opportunity to make a finding of joint and several liability against the DFCI defendants and the Globe defendants, the jury clearly declined to do so and awarded zero dollars in answer to the question asking for any damages awarded jointly and severally (Question 9).

Nor are the damages awarded against the Globe and Richard Knox duplicative. The jury had evidence that Globe

articles other than those written by Mr. Knox were defamatory and damaging to Dr. Ayash's emotional well being as well as her professional reputation. Thus, there is an evidentiary basis for the separate award of economic damages against the Globe in addition to that awarded against Mr. Knox. As to Mr. Knox, the jury heard evidence about defamatory articles written by Mr. Knox as well as conduct of Mr. Knox separate from and in addition to the published articles he wrote for the Globe which the jury could find justified separate verdicts against him for defamation and for infliction of emotional distress and/or interference with advantageous relations. There was no duplication of the damage awards found by the jury against Mr. Knox.

This jury was truly representative of a community of Dr. Ayash's peers. It was almost equally divided between men and women and they ranged in age from 24 to 59. Ten of the twelve had college degrees, and some of those ten had graduate degrees as well. There was one practicing lawyer in the group. There was nothing about their conduct during the trial or their questions while deliberating that indicated that they were motivated by passion or misunderstanding. Their questions were intelligent, and they did not appear to be confused by the instructions or by the verdict slip. Nor was there any indication that they wanted to punish the defendants. Indeed, when given the opportunity to award punitive damages, they awarded the relatively small sum of $5,000.00 only against DFCI.

Appendix B

C. The Motion of All Defendants for Limitation on the Interest Award

This motion is denied. The Legislature sets the interest rate by statute and it is up to the Legislature, not the Court, to determine if the rate is too high and, therefore, not compensatory.

D. The Motion for Judgment Notwithstanding the Verdict and/or the Motion for New Trial of DFCI and David Livingston Based on Grounds other than Damages

The issue of the admissibility of so-called peer review documents was addressed and decided prior to trial by Judge Peter Lauriat. It is the law of the case, and this Court declines to review and/or disturb it. The Court also believes that any jury instruction with respect to the default judgment that had been entered against the Globe was proper and sufficiently explanatory. It did not lead to jury confusion, nor did it lead to conclusions that were prejudicial to DFCI and Dr. Livingston. Specifically, the jury's questions indicated that they understood the distinction between the two sets of defendants. Furthermore, they found exactly the same total damages against both sets of defendants. Plaintiff argued the case on the theory that the defendants' actions that caused damage to the plaintiff, although based on different and separate legal theories, operated on a parallel course. The jury apparently accepted this argument and decided on a total damage figure which it did not find was owed jointly and severally, but separately. It then took the total damage figure and allocated it among the various defendants based on the

different claims asserted against them. The jury's findings were not against the weight of the evidence and do not warrant a new trial, nor do any other grounds asserted persuade the Court to enter a judgment NOV or order a new trial.

E. Motion of DFCI for Judgment Notwithstanding the Verdict and/or for a New Trial on Separate Grounds

I find that Dr. Ayash did not have to file a new discrimination claim with MCAD when she added a claim for retaliation against DFCI and Dr. Livingston. She had already filed a discrimination claim with MCAD and she could include a retaliation claim in the case properly filed in court. The evidence supported a finding of a causal relationship between the actions of the DFCI defendants and the non-renewal of Dr. Ayash's contract. This was clearly an adverse employment action and a basis for the retaliation verdict. There was also abundant basis in the evidence for a judgment on the invasion of privacy claim as well as on the breach of the implied covenant of good faith and fair dealing. DFCI's motion for judgment notwithstanding the verdict and for new trial on the basis that there was insufficient evidence to support the jury's verdict is denied .

Appendix B

F. Motion of Defendant David Livingston for Judgment Notwithstanding the Verdict or for a New Trial on Separate Grounds

This motion is also denied. The jury had a basis for finding that Dr. Livingston's actions were not based on a proper motive but were, in fact, the result of a desire to blame Dr. Ayash for what had occurred rather than DFCI itself. There was also sufficient evidence that he knew about her contract with DFCI and that even though he was no longer physician-in-chief, he was able to use his influence to see that it was not renewed. Accordingly, his separate motion is denied.

G. Motion of the Globe Defendants for a New Trial or Judgment Notwithstanding the Verdict on Grounds Other than Damages

All of the Globe defendants' remaining arguments for a new trial or judgment notwithstanding the verdict raise issues arising from Judge Peter Lauriat's decision prior to trial to enter a finding of liability against the Globe and Richard Knox on all claims asserted against them by the plaintiff for refusing to disclose their sources for the articles published about the death of Betsy Lehman. As a result of this ruling by Judge Lauriat, the only issue for the jury at trial with respect to these defendants was what amount of damages, if any, were caused to the plaintiff by the actions of the Globe and/or Mr. Richard Knox.

The Court has already discussed the damage award above. The Court declines to discuss and revisit the rulings

on other matters made by another justice of this court prior to trial. They remain live issues for any appeal of this case and do not provide, in this Court's view and at this stage of the case, a basis for a new trial or for a judgment notwithstanding the verdict.

CONCLUSION

In accordance with the above, and in summary, the disposition of all post-trial motions are as follows:

A. Motion to correct the Judgement of DFCI and David Livingston – **ALLOWED** in part and **DENIED** in part.

B. Joint Motions of all defendants for Remittitur and/or New Trial – **DENIED**.

C. Motion for a Limitation on Any Interest Award (orally joined by Globe defendants) – **DENIED**.

D. Joint Motions of DFCI and David Livingston for a New Trial – **DENIED**.

E. Separate Motion of DFCI for Judgment Notwithstanding the Verdict or, in the alternative for New Trial – **DENIED**.

F. Separate Motion of David M. Livingston for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial – **DENIED**.

Appendix B

G. Motion of Globe Newspaper Company and Richard Knox for New Trial or Remittitur or to alter the Judgment, or in the alternative, for a New Trial – **DENIED**. --

s/ Catherine A. White
Catherine A. White,
Justice of the Superior Court

DATED: August 28, 2003

APPENDIX C — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED APRIL 2, 2001

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 96-565-E

LOIS AYASH, M.D.

vs.

DANA FARBER CANCER INSTITUTE, DAVID M. LIVINGSTON, THE BOSTON GLOBE and RICHARD A. KNOX

MEMORANDUM OF DECISION AND ORDER ON (1) PLAINTIFF'S MOTION FOR SANCTIONS, INCLUDING CONTEMPT, PURSUANT TO RULE 37 AGAINST THE BOSTON GLOBE AND RICHARD KNOX, AND (2) MOTION OF DEFENDANTS GLOBE NEWSPAPER COMPANY AND RICHARD A. KNOX FOR RECONSIDERATION OF ORDER ON (1) THE PLAINTIFF'S RENEWED MOTION TO COMPEL CONFIDENTIAL SOURCE INFORMATION and (2) DEFENDANTS GLOBE NEWSPAPER COMPANY AND RICHARD A. KNOX'S RENEWED MOTION FOR PROTECTIVE ORDER

Appendix C

The plaintiff, Lois Ayash, M.D. ("Ayash"), has moved, pursuant to Mass. R. Civ. P. 37(b), for the impositions of sanctions against the *Boston Globe* newspaper and its reporter, Richard Knox ("Knox") (collectively, "the *Globe* defendants"), for their failure to comply with this Court's discovery orders dated October 21, 1999 and June 13, 2000. Those orders required the *Globe* defendants to provide discovery regarding the purported "confidential sources" relied upon by Knox in a series of articles which appeared in the *Boston Globe* in March of 1995. The articles, authored by Knox, concerned the death of *Boston Globe* reporter Betsy Lehman from an accidental chemotherapy overdose that she received while a patient at the defendant Dana Farber Cancer Institute.

In its October 21, 1999 Order, this court conducted the balancing test mandated by the Appeals Court in *Ayash v. Dana Farber Cancer Institute*, 46 Mass. App. Ct. 384, 393 (1999) (see *Petition for Promulgation of Rules*, 395 Mass. 164, 172 (1985), *citing Commonwealth v. Corsetti*, 387 Mass. 1, 5-6 (1982)), determined that Ayash's need for the information "is tangible and substantial and outweighs 'the public interests in protecting the free flow of information,'" and allowed the *Plaintiff's Renewed Motion to Compel Confidential Source Information.* The court also denied the *Defendants Globe Newspaper Company and Richard Knox's Renewed Motion for Protective Order.* In its June 13, 2000 Order, this court allowed the *Plaintiff's Motion to Compel Richard A. Knox to Answer One Interrogatory.*

Notwithstanding the court's orders, Knox has continued to refuse to reveal his purported "confidential sources" or

any information which might lead to the identification of those sources. The *Globe* defendants have also steadfastly refused to provide any discovery regarding the purported "confidential sources" under any circumstances.[1] The Court finds that the *Globe* defendants' ongoing refusal to comply with its October 21, 1999 and June 13, 2000 discovery orders constitutes a contempt, as well as a violation of the court's orders, and the *Globe* defendants are, therefore, subject to the sanctions authorized by Mass. R. Civ. P. 37(b)(2). The *Globe* defendants' motion for reconsideration is denied.

In fashioning appropriate sanctions to address the *Globe* defendants' conduct, the court has wide latitude to "make such orders in regard to the failure [to comply with a discovery order] as are just." Mass. R. Civ. P. 37(b)(2). See Smith & Zobel, Rules Practice, §§ 37.8 and 37.22 (1975 and Supp. 2000); *Atlas Tack Corp. v. Donabed*, 47 Mass. App. Ct. 221, 225 (1999). The court has the power to enter judgment in favor of the party aggrieved by the failure to comply with discovery orders. See Mass. R. Civ. P. 37(b)(2)(C) (court may "judgment by default against the disobedient party"); see also *Roxse Homes Ltd. Partnership v. Roxse Homes, Inc.*, 399 Mass. 401, 406 (1987) (affirming entry of judgment where there was a "clear violation of court orders" and the non-complying party "had more than one opportunity to comply and did not"). The court also has the power, "in lieu of any of the [Rule 37(b)(2)(A)-(D)] orders or in addition thereto" to treat "as a contempt of court the

1. For example, although Ayash has agreed to accept a limited protective order and this Court has indicated its willingness to grant such an order, the *Globe* defendants have refused to consider this proposal.

failure to obey any order," and to impose a prospective daily fine in order to coerce a contemptuous defendant into complying with the court's order. See *Labor Relations Comm'n v. Fall River Educator's Assn.*, 382 Mass. 465, 476 (1981).

In the present case, the court has already determined that the *Globe* defendants' refusal to comply with its discovery orders constitutes a contempt of the court. Unfortunately, that determination, and the resultant financial sanctions imposed by the court, have not succeeded in securing the *Globe* defendants' compliance with the court's discovery orders. Thus, the court must and does now impose an alternate sanction authorized by Rule 37(b)(2)—the entry of a default judgment against the *Globe* defendants on the plaintiff's claims pending against them. Mass.R.Civ.P. 37(b)(2)(C).

While entry of a judgment of default against the *Globe* defendants is an appropriate sanction to impose in the circumstances of this case, such an order does little to rectify the injustice inflicted upon the plaintiff's right to discovery in her case against the defendants Dana Farber Cancer Institute and David M. Livingston. The interests of justice will not be adequately served by the mere imposition of a default judgment against the *Globe* defendants, but the court, perhaps naively, clings to the hope that the *Globe* defendants will eventually recognize their continuing legal obligation to permit discovery in this matter and will ultimately comply with Ayash's narrow discovery requests.

Appendix C

The *Globe* defendants' refusal to disclose the identity of Knox's "confidential sources" may also effectively protect the Dana Farber Cancer Institute and David M. Livingston from liability in this action. In a case already beset by multiple tragedies, the *Globe* defendants' refusal to disclose their sources constitutes another ongoing, but imminently avoidable, harm to the participants in this case, as well as to the public's right to the free flow of information. The *Boston Globe*, long a champion of the freedom of information and of unfettered access to public (and even not-so-public) records, has unilaterally and unnecessarily interrupted the free flow of information that may be critical to Ayash. It is ironic that the *Globe* defendants' conduct may serve to effectuate the interests of the very hospital, as well as the hospital's former chief executive, where the *Boston Globe*'s own reporter was treated and died. It is not a legacy of which the *Globe* defendants should be proud.

ORDER

For the foregoing reasons, the Plaintiff's Motion for Sanctions, Including Contempt, Pursuant to Rule 37 Against *The Boston Globe* and Richard Knox is **ALLOWED**, and the Motion of Defendants Globe Newspaper Company and Richard A. Knox for Reconsideration of Order on (1) The Plaintiff's Renewed Motion To Compel Confidential Source Information, and (2) Defendants Globe Newspaper Company and Richard A. Knox's Renewed Motion for a Protective Order is **DENIED**.

Appendix C

A Judgment of liability shall enter in favor of the plaintiff Lois Ayash, M.D., on Counts VII, IX and X of her Amended Complaint and Jury Claim in this action, the matter shall be set down for a hearing on assessment of damages against the defendants Globe Newspaper Company and Richard A. Knox.

It is further **ORDERED**, pursuant to Mass.R.Civ.P. 37(b)(2), that the defendants Globe Newspaper Company and Richard A. Knox shall pay all reasonable attorneys fees and expenses incurred by the plaintiff, Lois Ayash, M.D., that were caused by the failure of the Globe Newspaper Company and Richard A. Knox to comply with the court's orders of October 21, 1999 and June 13, 2000. The plaintiff shall serve a detailed affidavit of costs and expenses, pursuant to Superior Court Rule 9A, within 45 days of the date of this Order.

s/ Peter M. Lauriat
Peter M. Lauriat
Justice of the Superior Court

Dated: April 2, 2001

APPENDIX D — ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED JUNE 13, 2000

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 96-0565-E

LOIS AYASH, M.D.

vs.

DANA-FARBER CANCER INSTITUTE, DAVID M. LIVINGSTON, THE BOSTON GLOBE, and RICHARD A. KNOX

ORDER ON PLAINTIFF'S MOTION TO COMPEL RICHARD A. KNOX TO ANSWER ONE INTERROGATORY

At first blush, allowance of this motion may appear to duplicate the court's already existing order requiring defendant Richard A. Knox ("Knox") to reveal his alleged confidential sources by indirectly requiring him to disclose the same information. However, Knox's failure to reveal his non-confidential sources after being ordered by this Court to do so would permit the plaintiff to request entry of a default judgment against him pursuant to Mass. R. Civ. P. 37(b)(2)(C). Since the remedy for failure to abide by the court's order with respect to this one interrogatory could be

a default judgment rather than a trial for and possible finding of contempt of court, allowance of the present motion would not be duplicative of any outstanding discovery order. Rather than face the prospect of incarceration or a substantial fine, Knox would have to balance his desire to protect the identity of those individuals who have given him non-confidential information against the probability of a default judgment as to liability and a hearing before the court to assess the damages his conduct has caused the plaintiff in this action.

Accordingly, Plaintiffs Motion to Compel Richard A. Knox to Answer One Interrogatory is **ALLOWED**. Knox shall answer Interrogatory No. I by or before July 10, 2000, or the plaintiff may thereafter apply, pursuant to Superior Court Rule 9A, for an order under Mass. R. Civ. P. 37(b)(2)(C).

s/ Peter M. Lauriat
Peter M. Lauriat
Justice of the Superior Court

Dated: June 13, 2000

APPENDIX E — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED OCTOBER 21, 1999

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 96-565-E

LOIS AYASH, M.D.

vs.

DANA-FARBER CANCER INSTITUTE, DAVID M. LIVINGSTON, THE BOSTON GLOBE, and RICHARD A. KNOX

MEMORANDUM OF DECISION AND ORDER ON (1) PLAINTIFF'S RENEWED MOTION TO COMPEL CONFIDENTIAL SOURCE INFORMATION, and (2) DEFENDANTS GLOBE NEWSPAPER COMPANY AND RICHARD KNOX'S RENEWED MOTION FOR PROTECTIVE ORDER

On February 26, 1999, the Appeals Court for the Commonwealth of Massachusetts vacated an order of this court dated February 23, 1998, compelling defendants, Richard Knox ("Knox") and The Boston Globe, to disclose the identity of Knox's confidential sources. The Appeals Court also vacated an August 13, 1998, order holding these defendants in contempt for refusing to disclose those sources.

Appendix E

See *Ayash v. Dana-Farber Cancer Institute, et al.*, 46 Mass. App. Ct. 384 (1999). The Appeals Court found that the defendants had indeed made "some showing" that disclosure of Knox's confidential sources presents a danger to the free flow of information that is more than speculative or theoretical.

Thus, the Appeals Court concluded that this court must determine, in light of the fact that Knox no longer seeks to protect the confidentiality of Karen Antman and that he has not claimed confidentiality for any of his sources for the two statements in his March 23, 1995 article, whether as to the libel claim against these defendants, Knox's disclosure of additional confidential sources would achieve more than the "needless disclosure of confidential relationships," and, whether disclosure is required as to the other non-libel counts in the complaint.[1] After hearing, and upon consideration of the memoranda and oral arguments of counsel, the plaintiff's renewed motion to compel confidential source information is allowed, and the defendants' motion for a protective order is denied.

DISCUSSION

In remanding this case, the Appeals Court ruled that this court must perform a balancing test to determine whether disclosure of the confidential source(s) is required. The test requires the court to balance "the public interest in every

1. Based on the representations of The Boston Globe and Knox, the plaintiff no longer argues that her libel claims require disclosure of Knox's confidential sources. Therefore, the court need not address this issue.

person's evidence and the public interest in protecting the free flow of information," in order to determine whether disclosure should be prevented or compelled. See *Petition for Promulgation of Rules*, 395 Mass. 164, 172 (1985), citing *Commonwealth v. Corsetti*, 387 Mass. 1, 5-6 (1982).

Three areas remain as to which these defendants seek to protect their sources, and as to which the plaintiff, Lois Ayash, M.D. ("Ayash"), claims a critical need for disclosure: (1) the source(s) of the May 23, 1995, Synopsis of the Conclusions and Recommendations of the Internal Peer Review Committee (the "Synopsis") and the "Institute Actions in Response to Synopsis of the Conclusions and Recommendations on the Internal Peer Review Committee of the Board of Trustees of the Dana-Farber Cancer Institute" ("Institute Response"); (2) the source(s) of the information pertaining to the Corrective Action proceedings against Ayash; and (3) the source(s) of the information that a complaint was pending against Ayash in the Board of Registration of Medicine.

In addition to the libel counts against The Boston Globe and Knox, Ayash has asserted claims for intentional interference with advantageous business relations, and intentional and negligent infliction of emotional distress against Knox. Ayash has also asserted claims against the defendant, Dana-Farber Cancer Institute ("DFCI"), alleging gender discrimination, breach of contract, breach of the covenant of good faith and fair dealing, invasion of privacy, and defamation; and, against the defendant, David Livingston, M.D. ("Livingston"), for defamation and intentional interference with advantageous business relations.

Appendix E

Ayash first seeks to identify the confidential source(s) who turned over the Synopsis and the Institute Response to Knox. The Synopsis and the Institute Response bears directly on Ayash's claims against Knox for intentional and negligent infliction of emotional distress, and against the DFCI for breach of contract, breach of the implied covenant of good faith and fair dealing, and invasion of privacy. Whether Knox engaged in actionable "extreme and outrageous behavior" depends on the methods and circumstances by which he obtained and revealed these documents.[2] The Boston Globe and Knox's refusal to provide and identifying information about the source(s) who provided the Synopsis and the Institute Response severely undermines Ayash's ability to establish the elements necessary to prove her intentional and negligent infliction of emotional distress claims.

Likewise, the identity of the source(s) of the Synopsis and the Institute Response bears directly on Ayash's claims against the DFCI defendants. Whether the DFCI breached the requirements of its own by-laws regarding confidentiality, whether the DFCI breached the implied covenant of good faith and fair dealing by turning over highly confidential material, and whether the DFCI invaded Ayash's privacy by releasing to the press a document which, until that point, was medical peer review material, all depend on whether the source(s) was a DFCI agent or employee.

Knox and The Boston Globe have both, in fact, refused to state whether the source of the Synopsis or the Institute

2. Indeed, the DFCI defendants have consistently asserted that the Synopsis, until that point, constituted statutorily protected medical peer review material.

Response was an employee or agent of DFCI. The only other available source of such information is the DFCI itself, which has likewise refused to admit that an employee or agent was the source(s) of the information. If the DFCI was not the direct or indirect source of the materials which ended up in the possession of Knox, Ayash's claims, to the extent they are dependent on the disclosure of the Synopsis and the Institute Response, will fail. Thus, identification of the source is critical.

The same reasoning holds true with regard to the information concerning the Corrective Action proceedings which were contractually mandated to be maintained in confidence; and, further, to the information regarding the Board of Registration of Medicine, which is required to remain confidential until an advanced phase in the proceedings which has never been reached in the present case. See 243 C.M.R. § 1.02(8)(b). In order to pursue her non-libel claims against the DFCI, Ayash must be able to prove that the DFCI was Knox's source of this information.

As previously determined by this court, Ayash has, and despite the Globe defendants' contrary view, exhausted all reasonable alternative sources for the information she seeks. Additionally, compelling Ayash to seek the information from alternate sources places an undue burden on Ayash. Ayash has made extensive efforts, albeit to no avail, to learn the sources of this information from sources other than The Boston Globe and Knox, deposing no less than twelve witnesses and propounding written discovery requests.

Thus, the court finds that Ayash's claims against the DFCI and Knox are absolutely dependent on confirmation that the source(s) was an agent or employee of DFCI. Without that confirmation, Ayash's claims will not succeed, and the "public's need for evidence" would be entirely thwarted. Thus, Ayash's need for this information is tangible and substantial and outweighs "the public interest in protecting the free flow of information."

Finally, the "public's interest in protecting the free flow of information" presumes that the information that flowed to the Globe defendants in this case is not otherwise protected from disclosure or publication by law, rule or regulation. Where, as here, it appears that the source(s) sought to be protected by the Globe defendants may well have made an improper and unlawful disclosure of that information, the balancing test tips *against* the continued confidentiality of that/those source(s). Nor should the source(s) of the statutorily protected information in this case be shielded by the argument that he/they have since, and in other matters, disclosed information to Knox. Such an argument cannot and does not justify the source(s) continued confidentiality in this case.

In sum, and on balance, the plaintiff's request for confidential source information must, in and limited to the circumstances of this case, be allowed.

Appendix E

ORDER

For the foregoing reasons, (1) Plaintiff's Renewed Motion to Compel Confidential Source Information is **ALLOWED** and (2) Defendants Globe Newspaper Company and Richard Knox's Renewed Motion for Protective Order is **DENIED**.

s/ Peter M. Lauriat
Peter M. Lauriat
Justice of the Superior Court

Dated: October 21, 1999

APPENDIX F — OPINION OF THE MASSACHUSETTS APPEALS COURT DATED FEBRUARY 26, 1999

APPEALS COURT OF MASSACHUSETTS, SUFFOLK

No. 98-P-1663.

LOIS J. AYASH

vs.

DANA-FARBER CANCER INSTITUTE & others.[1]

Suffolk. October 15, 1998. – February 26, 1999.

Present: WARNER, C.J., GREENBERG, & BECK, JJ.

WARNER, C.J. Richard A. Knox, a Boston Globe medical reporter, and the Globe Newspaper Company, publisher of The Boston Globe, collectively "the Globe defendants," appeal from a judgment of civil contempt for violating a Superior Court order to disclose Knox's confidential sources regarding a series of articles published in The Boston Globe (Globe). The series concerned accidental chemotherapy overdoses administered to Globe columnist Betsy Lehman and to another patient, Maureen Bateman. We vacate both the order of February 23, 1998, compelling the disclosure of confidential sources and denying the Globe defendants' motion for a protective order, and the order of August 13, 1998, imposing sanctions for civil contempt, and remand for further proceedings in the Superior Court.

---

1. David M. Livingston, Globe Newspaper Company, and Richard A. Knox.

Appendix F

The events underlying the Globe series were as follows. Lehman and Bateman were patients on an experimental breast cancer treatment protocol (protocol) at the Dana-Farber Cancer Institute (Dana-Farber). The protocol involved the administration of high doses of the drug cyclophosphamide. The plaintiff, Dr. Lois Ayash, a physician at Dana-Farber, was protocol chair and principal investigator for the protocol. In mid-November, 1994, a physician on Lehman and Bateman's clinical treatment team erroneously administered a fourfold overdose of the drug. Lehman died on December 3, 1994, as a result of the error.[2] Bateman suffered severe toxicity, but survived.[3]

It was not until February, 1995, that a data manager at Dana-Farber discovered that the overdoses had been administered. Dana-Farber then suspended the clinical privileges of two physicians who had been directly involved in the patients' care when the overdoses were given. No action was taken against Ayash at that time. On March 31, 1995, Ayash's clinical privileges were suspended and she was assigned to administrative duty. She became the subject of two Dana-Farber internal investigations and an investigation by the Massachusetts Board of Registration in Medicine (board of registration).

---

2. Ayash began a rotation as the attending physician for Lehman and Bateman on December 1, 1994. At that time, Lehman and Bateman had already suffered adverse reactions to the cyclophosphamide treatment, but Ayash did not discover that the overdoses had occurred.

3. According to the plaintiff, Bateman later succumbed to her breast cancer.

Appendix F

The Globe published the first of Knox's articles concerning these events on March 23, 1995. In that initial article, Knox made two statements which Ayash contends are defamatory. First, he erroneously identified her as one of the doctors who had countersigned the mistaken order. Second, he identified her as the "leader of the team," which, Ayash contends, wrongly implied that she had direct patient care responsibilities for Lehman and Bateman when the overdoses were administered. On February 1, 1996, Ayash brought suit against the Globe defendants for libel and for breach of confidentiality and privacy[4]; against Knox; against Dana-Farber; and against David M. Livingston, M.D.[5]

Knox concedes that he was told within four days of publication that Ayash did not countersign the overdose orders.[6] Ayash energetically sought, and Knox refused to disclose, the identity of the source who had informed him of

---

4. The Globe defendants were granted partial summary judgment on Ayash's invasion of privacy claim.

5. Counts against Knox are for intentional interference with advantageous business relations, and intentional and/or negligent infliction of emotional distress.

Counts against Dana-Farber are for gender discrimination, breach of contract, breach of the implied covenant of good faith and fair dealing, breach of confidentiality and privacy, and defamation.

Counts against Livingston, who was physician-in-chief at Dana-Farber during 1994 through the spring of 1995, are for defamation and intentional interference with advantageous business relations.

6. The Globe published a correction on June 4, 1995.

his mistake. That source has now been identified as Karen Antman, a former physician at Dana-Farber. The disclosure occurred on August 18, 1998, after the Superior Court judge had issued the orders under appeal.[7] Knox no longer seeks to maintain confidentiality with regard to Antman.

According to her brief on appeal, Ayash continues to seek the identities of Knox's sources who disclosed the following information which, she asserts, should have been kept confidential: (1) the information that Ayash was the subject of a Dana-Farber internal "corrective action" investigation; (2) the information that Ayash was the subject of an investigation by the board of registration; and (3) documents provided to Knox concerning recommendations made by Dana-Farber's internal peer review committee and Dana-Farber's responses.[8]

Upon Knox's refusal during discovery to provide any information which would lead to the disclosure of his confidential sources' identities, Ayash moved to compel

---

7. Ayash herself named Antman during a deposition conducted by Dana-Farber. She stated that Antman, a friend of hers, had told her that she telephoned Knox "shortly after the first article came out from The Globe and told him essentially that he had made a major mistake in what he had reported and in terms of what a [principal investigator] is responsible for."

8. The documents are titled, "Synopsis of the Conclusions and Recommendations of the Internal Peer Review Committee" (dated May 23, 1995), and "Institute Actions in Response to Synopsis of the Conclusions and Recommendations of the Internal Peer Review Committee of the Board of Trustees of the Dana-Farber Cancer Institute."

disclosure. The Globe defendants moved for a protective order. On February 23, 1998, the Superior Court judge granted Ayash's motion and denied the Globe defendants' motions.

A single justice of this court denied the Globe defendants' petition, pursuant to G.L. c. 231, § 118, first par., seeking reversal of or leave to take an interlocutory appeal from the Superior Court judge's orders.[9] As Knox persevered in his refusal to reveal his confidential sources, the Superior Court judge issued a contempt order and imposed monetary sanctions on Knox and the Globe on August 13, 1998. Knox was ordered to pay a fine of one hundred dollars per day beginning August 24, 1998, the amount to escalate by one hundred dollars per day each successive week that he failed to comply with the discovery order. The Globe was fined one thousand dollars per day beginning August 24, 1998, the amount to escalate by one thousand dollars per day each successive week that it refused to comply with the discovery order. A single justice of this court ordered a stay of execution on the contempt judgment pending an expedited appeal.

On August 28, 1998, the Globe defendants moved in Superior Court for reconsideration of the discovery and sanction orders as a result of the August 18, 1998, disclosure of Karen Antman's identity. The record before us indicates

---

9. The single justice's order was without prejudice to the Globe defendants submitting a motion to the Superior Court for a more narrowly tailored protective order. The proposal they had submitted would have prohibited all discovery Ayash sought to be compelled. The Globe defendants refused to submit a more narrowly tailored protective order.

that the motion is pending. We will nevertheless proceed with our review in the interests of expediting this appeal.

"The validity of an underlying discovery order, disobedience of which has led to an adjudication of contempt, may be challenged on appeal from the adjudication of contempt." *Matter of Roche*, 381 Mass. 624, 625 n.1 (1980). We now review the rulings of the Superior Court judge denying a protective order and granting the motion to compel in order to determine whether they constituted an abuse of discretion. See *Sinnott v. Boston Retirement Bd.*, 402 Mass. 581, 585-586, cert. denied, 488 U.S. 980 (1988).

No constitutional or statutory privilege or rule of court protects news reporters' sources of information. As the Superior Court judge stated in his memorandum of decision ordering disclosure of Knox's sources, there is no constitutionally based privilege protecting news reporters' sources of information. *Matter of a John Doe Grand Jury Investigation*, 410 Mass. 596, 598 (1991), and cases cited. Nor is there any statutory privilege or rule of court providing for such a privilege. *Id.* Nevertheless, "[i]t is well settled that, in supervising discovery, a presiding judge is 'obliged to consider the effect that compelled discovery would have on "the values protected by the First Amendment, [even] though [these values were] entitled to no constitutional privilege." ' *Matter of Roche, supra* at 636, quoting *Herbert v. Lando*, 441 U.S. 153, 180 (1979) (Powell, J., concurring). The 'needless disclosure of confidential relationships,' *Matter of Roche, supra* at 637, is, therefore, to be avoided." *Sinnott v. Boston Retirement Bd.*, 402 Mass. at 586.

Appendix F

Developing common law protection for news reporters' confidential sources of information. In 1985 the Supreme Judicial Court refused to adopt rules which would provide for an evidentiary privilege for news reporters' sources of information, advocating instead a common law approach as "more likely to result in principles that are flexible enough to maintain an appropriate balance between the competing interests involved." *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information* (hereafter *Petition for Promulgation of Rules*), 395 Mass. 164, 171 (1985). The court there stated that under common-law principles already developed, a party seeking to avoid disclosure must first "make some showing that the asserted damage to the free flow of information is more than speculative or theoretical." *Id.* at 172, citing *Matter of Roche*, 381 Mass. at 635, and *Matter of Pappas*, 358 Mass. 604, 612 (1971), aff'd. sub nom. *Branzburg v. Hayes*, 408 U.S. 665 (1972). Only then will the court go on to balance "the public interest in every person's evidence and the public interest in protecting the free flow of information," in order to determine whether disclosure should be prevented. 395 Mass. at 172, citing *Commonwealth v. Corsetti*, 387 Mass. 1, 5-6 (1982).

The evidence required to make "some showing" of a risk to the free flow of information. The Supreme Judicial Court has not discussed in detail the nature and extent of evidence required to make "some showing" that disclosure poses a risk to the free flow of information. In *Petition for Promulgation of Rules*, it stated that there is no privilege for information that has already been published. 395 Mass. at 172, citing *Commonwealth v. Corsetti*, 387 Mass. at 4-5.

Appendix F

In an earlier case, the court intimated that the bald allegation that disclosure of a news reporter's confidential sources will impede the free flow of information would not be enough to satisfy this burden. See *Matter of Pappas*, 358 Mass. at 612.

The two most recent Supreme Judicial Court cases concerning this matter, *Sinnott v. Boston Retirement Bd.*, 402 Mass. 581 (1988), and *Matter of a John Doe Grand Jury Investigation*, 410 Mass. 596 (1991), affirmed the Superior Court's grant of investigative news reporters' motions to quash subpoenas for disclosure of confidential sources,[10] and touched on the evidentiary requirements for meeting the test of some showing that disclosure poses a risk to the free flow of information (the "threshold showing"). In neither case did the court appear to require a burdensome showing.

In *Sinnott v. Boston Retirement Bd.*, *supra*, the court commented only indirectly on this issue. Affirming the denial of a motion to compel discovery of a Globe reporter's sources

---

10. Earlier cases affirmed orders to disclose. See *Matter of Pappas*, *supra* (a motion to quash a grand jury summons to a reporter to testify about a visit to Black Panther headquarters was denied); *Dow Jones & Co. v. Superior Court*, 364 Mass. 317 (1973) (a reporter was obligated to identify the source of allegedly defamatory statements quoted in a news article); *Matter of Roche*, 381 Mass. 624 (a reporter was ordered to testify at a deposition in a judicial disciplinary action concerning sources of information for a television investigative report on District Court judges); *Commonwealth v. Corsetti*, 387 Mass. 1 (1982) (a reporter was ordered to testify at a hearing on a motion to suppress evidence in an impending criminal trial regarding a telephone conversation he had had with the defendant).

for an article concerning the Boston retirement board's alleged abuses in awarding pensions, 402 Mass. at 582-587, it concluded that the Superior Court judge was warranted in applying the balancing test. There was no discussion of the nature of the threshold showing. *Id.* at 586. In its discussion of the balancing test, however, the Supreme Judicial Court appears to have embraced the view that forced disclosure of investigative news reporters' confidential sources of information carries an inherent threat to the free flow of information. "[T]he public interest in nondisclosure rest[s] upon the concern that 'the deterrent effect such disclosure is likely to have upon future "undercover" *investigative reporting* . . . threatens freedom of the press and the public's need to be informed.' " *Id.* at 587, quoting from *von Bulow* v. *von Bulow*, 811 F.2d 136, 142-143 (2d Cir.), cert. denied sub nom. *Reynolds v. Von Bulow*, 481 U.S. 1015 (1987).

Three years later, in *Matter of a John Doe Grand Jury Investigation*, 410 Mass. 596 (1991), the court considered the nature of a threshold showing. *Doe* affirmed a Superior Court judge's allowance of motions to quash grand jury subpoenas issued to two news reporters for the purpose of discovering the identities of their confidential sources regarding a murder investigation. *Id.* at 596-597. The motion judge concluded that the reporters had met the threshold test. The court thought the judge's determination warranted, based on his ultimate finding "that the reporters would not have received the information they obtained if they had not promised anonymity to their sources and that the reporters' future news-gathering ability, both generally and in the case being investigated by the grand jury, would be impaired if they violated their promises." *Id.* at 600. The court did not

comment further on the evidence required to meet the threshold showing. Its brief treatment of the issue again may signal the view that the court does not consider the initial burden to be heavy.[11]

The defendants' initial burden. In the case before us, the Superior Court judge concluded that the defendants had not shown that the disclosure of Knox's confidential sources would pose more than a speculative or theoretical risk to the free flow of information. Our reading of the record is that certain of the subsidiary findings on which the judge based his ultimate one are not supported by the evidence.

The Superior Court judge found that Knox's informants do not continue to provide him with information, and that Knox was not involved in a continuing investigation. The extent and significance of Knox's continuing relation with his sources must be viewed in the context of his long-term relationships with medical experts who provide him information when called upon. Knox testified in his deposition of June 11, 1996, that during his twenty-seven years as a medical reporter he has cultivated numerous sources in the medical community and has established continuing relationships with experts upon whom he relies for information in specialized areas. Among these sources

---

11. The court's approach to the threshold test cannot be ascribed simply to adherence to a deferential standard of review (see *Sinnott v. Boston Retirement Bd.*, 402 Mass. at 586), since it declined to defer to the Superior Court judge when it reviewed his conduct of the balancing test. It disagreed with the judge's analysis of the evidence in that context and supplanted his balancing test with its own. *Matter of a John Doe Grand Jury Investigation*, 410 Mass. at 601.

are individuals who have agreed to provide information only upon the promise of confidentiality. If Knox were unable to keep such promises, his future ability to gather and publish information from these and other sources who wish to remain anonymous would suffer. See *Matter of a John Doe Grand Jury Investigation, supra* at 600.

With regard specifically to Knox's confidential sources for the series of articles at issue, Knox testified in a deposition on May 7, 1998, after the issuance of the discovery order but before the order for contempt and sanctions was issued, that two of these confidential sources had subsequently provided him with information concerning other matters.[12]

We do not question the trial judge's determination that Knox was not actively engaged in a continuing investigation at the time of trial. However, the record reflects that the board of registration's proceedings concerning the overdose incident were ongoing at least as late as September, 1997; there is no indication in the record that they have been concluded. As these proceedings unfold, Knox will in all likelihood report on further developments and may well turn to his earlier confidential sources for information.

The judge further found that the information was given to Knox over two and one-half years previously and concerned an "isolated incident." The characterization of the chemotherapy overdosing as an "isolated incident" does not

---

12. Knox testified that one of these sources had provided him with information during the spring of 1998, and the other, the person who had given him the May 23, 1995, synopsis of Dana-Farber's internal investigation, had provided information in late 1996 or 1997.

comport with the facts on the record. A report issued by Dana-Farber documenting the results of two committee investigations into the matter[13] indicates that the overdosing had long-term repercussions and was of widespread public importance.[14] The investigators found structural deficiencies in Dana-Farber's requirements for research protocols, in its clinical procedures, in its pharmacy's procedures and technology, and in its quality assurance program. According to the report, Dana-Farber took extensive corrective actions as a result of the investigators' recommendations, and the report itself was being disseminated both to clarify the situation at Dana-Farber, and to "provid[e] other cancer care providers with insights that may benefit patients and institutions throughout the country." In order to follow up on the corrective measures taken by Dana-Farber or to report on ways other institutions may have been affected, Knox could seek information from the confidential sources he used earlier.[15] Compare *Sinnott v. Boston Retirement Bd.*, 402 Mass. at 587 n.5.

---

13. The document, dated October 30, 1995, titled, "A Special Report from the Board of Trustees and Administration of the Dana-Farber Cancer Institute to its Various Constituencies," presents the results of investigations by an internal peer review committee and an external peer review committee.

14. In dismissing Ayash's privacy claims against the Globe defendants, the Superior Court judge found that Knox's reporting in this case concerned events of "public concern" about health care issues.

15. The judge also found that the information sought was not cumulative or otherwise available. This finding is not relevant to the threshold showing, but rather to the balancing test required after the party seeking to avoid disclosure has met the threshold showing.

Appendix F

Like the reporters in *Matter of a John Doe Grand Jury Investigation*, the Globe defendants have met the threshold showing by demonstrating that "the reporter[] would not have received the information [he] obtained if [he] had not promised anonymity to [his] sources and . . . the reporter['s] future news-gathering ability, both generally and in the case being investigated . . . would be impaired if [he] violated [his] promises." 410 Mass. at 600.

The balancing test concerning the libel claim against the Globe defendants. Because the Globe defendants have made "some showing" that disclosure of Knox's confidential sources presents a danger to the free flow of information that is more than speculative or theoretical, *Petition for Promulgation of Rules*, 395 Mass. at 172, that danger must be balanced against the public's need for evidence. The Superior Court judge did, in fact, balance these factors despite having found that the defendants had not met their initial burden. His specific findings, however, appear to have been limited to the libel count against the Globe defendants.

With regard to this claim, Ayash's arguments before the Superior Court judge focused on her need for disclosure of the source who had informed Knox of errors in his March 23 article. Access to this source, she contended, would permit her to assess whether Knox could have obtained the correct information before publication. This source has now been revealed as Karen Antman. Knox no longer seeks to protect her confidentiality, and on appeal Ayash makes no request for further compelled disclosure regarding Antman. Additionally, Knox has not claimed confidentiality for any of his sources for the two statements in the March 23 article

which Ayash contends defamed her.[16] In light of these facts, the Superior Court judge must determine upon remand whether, as to the libel claim against the Globe defendants, Knox's disclosure of additional confidential sources would achieve more than the "needless disclosure of confidential relationships." *Petition for Promulgation of Rules*, 395 Mass. at 172, and cases cited.

Disclosure of sources concerning the plaintiff's other claims. Ayash argues that other counts of her complaint require the disclosure of additional confidential sources. These contentions may have merit. However, "the judge's explanation of his decision on the record [is] a necessary aid to proper appellate review in this field." *Id.* at 173, and cases cited. Thus, the Superior Court judge must perform the required balancing test and make findings as to whether disclosure is required with regard to the other counts of Ayash's complaint.

Conclusion. The orders of February 23 and August 13, 1998, are vacated. The case is remanded for findings and conclusions consistent with this opinion.

So ordered.

---

16. In his deposition of June 11, 1996, as well as in his answers to interrogatories, Knox responded to questions concerning both statements. He testified that he mistakenly identified Ayash as a cosignatory on the overdose order because he misread a signature on the medical record as Ayash's, then consulted with the lawyer for Ms. Lehman's estate, who also thought that the signature was Ayash's. He stated that he had characterized Ayash as team leader because she was principal investigator of the protocol, because she was listed on some documents as Lehman's primary physician, and because of references made by others, whom Knox named, regarding Ayash's role.

APPENDIX G — ORDER OF THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS DENYING PETITION FOR REHEARINGDATED MARCH 2, 2005

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Jonathan M. Albano, Esquire
Bingham McCutchen LLP
150 Federal Street
Boston, MA 02110

RE: No. SJC-09236

LOIS AYASH
vs.
DANA-FARBER CANCER INSTITUTE & others

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the Court and is denied.

Susan Mellen, Clerk

Dated: March 2, 2005

Supreme Court, U.S.
FILED
JUL 7 - 2005
OFFICE OF THE CLERK

(2)

No. 04-1634

IN THE

Supreme Court of the United States

GLOBE NEWSPAPER COMPANY, INC.
AND RICHARD A. KNOX,

Petitioners,

v.

LOIS J. AYASH, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

JOAN A. LUKEY
Counsel of Record
GABRIELLE R. WOLOHOJIAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

QUESTION PRESENTED

Whether the Supreme Judicial Court of Massachusetts correctly held that the Massachusetts Superior Court did not abuse its discretion in imposing a discovery sanction under Mass. R. Civ. P. 37(b)(2)(C) where, on the facts of the case, Respondent's need for the information and outweighed any potential threat to the free flow of information.

PARTIES TO THE PROCEEDINGS

Respondent Lois J. Ayash, M.D. was the plaintiff below. Petitioners Globe Newspaper Company, Inc. and Richard A. Knox were defendants below, together with defendants Dana-Farber Cancer Institute and David Livingston, M.D., who is no longer a party to the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Preliminary Statement 1

B. Factual Statement 3

C. Statement of Proceedings in State Court 4

ARGUMENT 14

I. THE PETITION FOR CERTIORARI RAISES NO IMPORTANT FEDERAL QUESTION 14

A. Discovery Rulings, Including Those Imposing Default Or Involving Assertions Of A Reporter's Privilege, Do Not Merit Review By This Court 14

B. The Discovery Rulings Raise No Important Federal Question Concerning The First Amendment 16

C. The Discovery Sanction Raises No Important Federal Question Of Due Process Under The Fourteenth Amendment 18

II. THE SUPREME JUDICIAL COURT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, THE FEDERAL COURTS OF APPEALS, OR THE DECISIONS OF THE HIGHEST COURT OF ANOTHER STATE 19

TABLE OF CONTENTS—Continued

Page

A. The Supreme Judicial Court's Decision Does Not Conflict With The Decisions Of This Court 19

B. The Supreme Judicial Court's Decision Does Not Conflict With The Decisions Of The Federal Courts Of Appeals 22

1. Assertion of reporter's privilege 22

2. Discovery sanction of default 26

C. The Supreme Judicial Court's Decision Does Not Conflict With The Decisions Of The Highest Court Of Another State 27

1. Assertion of reporter's privilege 27

2. Discovery sanction of default 29

CONCLUSION 30

APPENDIX A: Memorandum of Decision and Order of the Superior Court of the Commonwealth of Massachusetts dated July 8, 1997 ..... 1a

APPENDIX B: Memorandum of Decision and Order of the Superior Court of the Commonwealth of Massachusetts dated February 23, 1998 ..... 15a

APPENDIX C: Order of the Appeals Court of the Commonwealth of Massachusetts dated April 13, 1998 ..... 21a

APPENDIX D: Order of the Superior Court of the Commonwealth of Massachusetts dated August 13, 1998 ..... 23a

TABLE OF AUTHORITIES

CASES

Page(s)

Adolph Coors Co. v. *Movement Against Racism and The Klan*, 777 F.2d 1538 (11th Cir. 1985) 26
Atlanta Journal-Constitution v. *Jewell*, 251 Ga. App. 808 (2001), *cert. denied*, 537 U.S. 814 (2002) 28
Bartnicki v. *Vopper*, 532 U.S. 514 (2001) 20
Bordenkircher v. *Hayes*, 434 U.S. 357 (1978) 20
Branzburg v. *Hayes*, 408 U.S. 665 (1972) ..... *passim*
Bridges v. *California*, 314 U.S. 252 (1941) 20, 21
Bruno & Stillman, Inc. v. *Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) 23
Carey v. *Hume*, 492 F.2d 631 (D.D.C.), *cert. dismissed*, 417 U.S. 938 (1974) 15
Caryl Richards, Inc. v. *Superior Court*, 188 Cal. App. 2d 300 (1961) 29
Cervantes v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) 25
City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41, *reh'g denied*, 475 U.S. 1132 (1986) 20
Consolidated Edison Co. of New York, Inc. v. *Public Service Commission of New York*, 447 U.S. 530 (1980) 20, 21
Cooper v. *United States*, ___S.Ct. ___, 2005 WL 1121635, 73 U.S.L.W. 3686, 73 U.S.L.W. 3702 (June 27, 2005) (C.A. No. 04-1508) 15
Craig v. *Harney*, 331 U.S. 367 (1947) 20
Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967) 17, 21
Dalitz v. *Penthouse International, Ltd.*, 168 Cal. App. 3d 468 (1985) 29
DeGregory v. *Attorney General of New Hampshire*, 383 U.S. 825 (1966) 21
DeRobert v. *Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981) 22
Dowd v. *Calabrese*, 577 F. Supp. 238 (D.D.C. 1983) 22
Downing v. *Monitor Publishing Co.*, 415 A.2d 683 (N.H. 1980) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Farr v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) 25
Fjelstad v. *American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985) 27
Freedman v. *Maryland*, 380 U.S. 51 (1965) 20
Gagnon v. *The District Court*, 632 P.2d 567 (Colo. 1981) 29
General Insurance Co. of America v. *Eastern Consolidated Utilities*, 126 F.3d 215 (3d Cir. 1997) 27
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 17, 21
Gonzales v. *National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999) 24
Grand Forks Herald v. *The District Court*, 322 N.W.2d 850 (N.D. 1982) 28
Hammond Packing Co. v. *Arkansas*, 212 U.S. 322 (1909) 18, 19
Henry v. *Sneiders*, 490 F.2d 315 (9th Cir.), *cert. denied*, 419 U.S. 832 (1974) 15
Herbert v. *Lando*, 441 U.S. 153 (1979) 16, 17
Hopewell v. *Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1995), *cert. denied*, 519 U.S. 817 (1996) 28, 29
Hovey v. *Elliott*, 167 U.S. 409 (1897) 18, 29
Hustler Magazine, Inc. v. *Falwell*, 485 U.S. 46 (1988) 21
In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987) 25
In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004) 23
Insurance Corporation of Ireland, Ltd. v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) 14
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 20
Larouche v. *National Broadcasting Company, Inc.*, 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986) 24
Laxalt v. *C.K. McClatchy*, 116 F.R.D. 438 (D. Nev. 1987) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Mazzella v. *Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) 22
McGraw-Hill, Inc. v. *Arizona*, 680 F.2d 5 (2d Cir. 1982) 24
McKevitt v. *Pallasch*, 339 F.3d 530 (7th Cir. 2003) 25
Miller v. *Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) 15
Miller v. *United States*, __S.Ct. __, 2005 WL 1121635, 73 U.S.L.W. 3686, 73 U.S.L.W. 3702 (June 27, 2005) (C.A. No. 04-1507) 15
Mitchell v. *The Superior Court of Marin County*, 37 Cal. 3d 268 (1984) 28
Mitchell v. *Watson*, 58 Wash. 2d 206 (1961) 29
National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, *reh'g denied*, 429 U.S. 874 (1976) 14, 18
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 9, 17
Oak Beach Inn Corp. v. *Babylon Beacon, Inc.*, 464 N.E.2d 967 (N.Y. 1984) 28
Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information, 395 Mass. 164 (1985) 18, 29
Philadelphia Newspapers, Inc. v. *Hepps*, 475 U.S. 767 (1986) 21
Riley v. *City of Chester*, 612 F.2d 708 (3d Cir. 1979) 24
Roadway Express, Inc. v. *Piper*, 447 U.S. 752 (1980) 15
Roxse Homes Ltd. Partnership v. *Roxse Homes, Inc.*, 399 Mass. 401 (1987) 19
Sands v. *News America Publishing Inc.*, 161 A.D.2d 30 (N.Y. App. Div. 1990) 28
Sharon v. *Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984) 22
Shoen v. *Shoen*, 5 F.3d 1289 (9th Cir. 1993) 25
Sierra Life Insurance Co. v. *Magic Valley Newspapers, Inc.*, 101 Idaho 795 (1981) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Silkwood v. *The Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) 25
Sivelle v. *Maloof*, 373 F.2d 520 (1st Cir. 1967) 24
Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. *Rogers*, 357 U.S. 197 (1958) 18,19, 29
Speiser v. *Randall*, 357 U.S. 513 (1958) 20
Sprague v. *Walter*, 543 A.2d 1078 (Pa. 1988) 28
State of West Virginia v. *Henry*, 182 W. Va. 500 (1990) 29
United States v. *Bryan*, 339 U.S. 323, *reh'g denied*, 339 U.S. 991 (1950) 21
United States v. *Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983) 15
United States v. *Kahalu Construction Co.*, 857 F.2d 600 (9th Cir. 1988) 27
Winegard v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 436 U.S. 905 (1978) 29
Zerilli v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981) 26

RULES

Federal Rules of Civil Procedure 37 ..... 14, 16, 19
Massachusetts Rules of Civil Procedure 37(b)(2)(C) 14

Respondent Dr. Lois Ayash respectfully requests that the petition for writ of certiorari be denied, both because the decision of the Supreme Judicial Court does not present an important federal question and because it is not in conflict with the decisions of this Court, the federal courts of appeals, or any state court of last resort.

OPINIONS BELOW

In addition to the Petitioners' list of opinions below, Respondent adds: (a) the opinions of the Massachusetts Superior Court dated July 8, 1997 and February 23, 1998, reported respectively at 7 Mass. L. Rptr. 176 and 8 Mass. L. Rptr. 73 (Resp. App. 1a-14a; Resp. App. 15a-19a); (b) the unreported opinion of the Massachusetts Appeals Court dated April 13, 1998 (Resp. App. 21a-22a); and (c) the unreported opinion of the Massachusetts Superior Court dated August 13, 1998 (Resp. App. 23a-25a).

JURISDICTIONAL STATEMENT

Respondent does not dispute Petitioners' jurisdictional statement.

CONSTITUTIONAL PROVISIONS INVOLVED

There are no constitutional provisions appropriately invoked in reviewing a discovery sanction imposed under Rule 37 of the Massachusetts Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Preliminary Statement

This case does not involve any restraint on publication. It does not involve any question about what Petitioners published or what they may have wanted to publish. Petitioners were at all times free to publish what they wanted, where they wanted, how and when they wanted. There is no claim that Petitioners were in any way prevented from exercising their First Amendment freedoms or rights. Like *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this case

> involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command

> that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

Id. at 681-682.

Instead, this case involves a discovery sanction imposed under state rules (*i.e.*, Mass. R. Civ. P. 37(b)(2)(C)) against defendants who refused under any circumstances to produce non-confidential, as well as so-called "confidential source," information. The discovery sought was critical to Dr. Ayash's claims against Petitioner Knox, his co-defendants the Dana-Farber Cancer Institute and Dr. David Livingston, and to Dr. Ayash's claim of joint and several liability among all defendants. Contrary to Petitioners' contention, any considerations arguably rooted in the First Amendment with respect to "confidential" sources were taken into account at all stages of the state court proceedings, both at the trial and appellate levels. Specifically, discovery was not compelled until after a careful common-law, fact-intensive, balancing of Dr. Ayash's need for the information and the public's interest in the free flow of information had been undertaken. Similarly, the sanction was not imposed until after all lesser alternatives had been explored, tested, and found insufficient. At all times, Petitioners were free to avoid the sanction by complying with the court's discovery orders. They deliberately chose instead to voluntarily incur the sanction.

The fact-intensive tests employed below—like all discovery rulings—were and are to be reviewed for abuse of discretion. More importantly for present purposes, those discovery rulings do not raise any important federal question, let alone one in conflict with decisions of this Court, the

federal courts of appeals, or the highest court of any other state.

B. Factual Statement

On March 23, 1995, The Boston Globe published a front-page article carrying the banner headline "Doctor's Orders Killed Cancer Patient." Dr. Ayash was the only doctor identified by name in the article, which stated that she had countersigned a fatal chemotherapy overdose order and that she was the "leader of the team" treating the patient. Both statements were false.[1] Richard Knox, who wrote the article, made the determination himself that Dr. Ayash had countersigned the order, relying on nothing more than his uneducated guess about the signature in the medical record. The medical record in his possession (which he did not check), however, contained numerous examples of Dr. Ayash's signature, any of which would have easily shown that the signature on the overdose order was not hers.

Within four days of the article, Richard Knox and The Boston Globe knew from a confidential source that Dr. Ayash had not countersigned the order. However, no correction or retraction was published until approximately ten weeks later; even then, the correction addressed only the mistaken statement that Dr. Ayash had countersigned the order. The false statement identifying Dr. Ayash as the "leader of the team" was never retracted.

The March 23, 1995 article was only the first in a series of articles published by The Boston Globe concerning the accidental overdoses. Subsequent articles published highly-confidential and statutorily-protected materials concerning internal and external investigations into the overdoses. These included statements concerning the fact that Dr. Ayash was the subject of internal Corrective Action proceedings at the Dana-Farber Cancer Institute ("DFCI"),

---

[1] The falsity of the first statement has never been disputed. The falsity of the second was found by the jury even though that finding was not required.

that she has been referred to the Board of Registration in Medicine, and the conclusions and findings of an internal peer review committee known as the "Sallan Committee."

The latter included two documents, "Synopsis of the Conclusions and Recommendations of the Internal Peer Review Committee of the Board of Trustees of the Dana-Farber Cancer Institute" ("Synopsis") and the "Institute Actions in Response to Synopsis of the Conclusions and Recommendations of the Internal Peer Review Committee of the Board of Trustees of the Dana-Farber Cancer Institute" ("Response"). Both documents were provided to the Petitioners by a confidential source whom they refused to identify and whose identity was otherwise undiscoverable. Likewise, Petitioners refused to identify their "confidential" sources for the protected Corrective Action information or for the statutorily-protected information concerning the investigation by the Board of Registration in Medicine. The identities of those sources were also otherwise undiscoverable. Petitioners also refused to produce relevant information about *non-confidential* sources.

Before the March 23, 1995 article, Dr. Ayash had never been in the public eye and "was in no sense a public figure." Resp. App. 10a. However, as a result of the Petitioners' relentless coverage designed, in part, to attempt to make true that which was false (*i.e.*, that she was the "leader of the team" or otherwise centrally involved), she was involuntarily thrust into public view. Petitioners' coverage caused Dr. Ayash to be scapegoated by the DFCI, exposed her to unwarranted investigation and censure, led to tremendous emotional distress and reputational harm, and ultimately contributed to her dismissal from the DFCI, her inability to find work within the reach of Petitioners' circulation, and her forced relocation to another part of the country into a different type of position.

C. Statement of Proceedings in State Court

Dr. Ayash brought suit against Petitioners Globe Newspaper Company, Inc. ("The Boston Globe") and Richard A. Knox, alleging defamation/libel (against The Boston

Globe and Knox), violation of privacy rights under Massachusetts General Laws chapter 111, sections 203 and 53B (against The Boston Globe and Knox),[2] Intentional/Negligent Infliction of Emotional Distress (against Knox), and Intentional Interference with Advantageous Business Relationships (against Knox). In addition, Dr. Ayash asserted claims against the DFCI and its former Physician-in-Chief, David M. Livingston, M.D. "At the heart of [Dr. Ayash's] case were her intertwined assertions that officials at Dana-Farber were intentionally 'scapegoating' [her], at the same time that the Globe and Knox were intentionally 'spotlightling' her for public censure." Pet. App. 49a. Given the interconnection between the activities of Petitioners and their co-defendants, Dr. Ayash pursued, among other theories, a claim of joint and several liability.

Throughout lengthy discovery, Petitioners' refused to provide any information concerning their so-called "confidential" sources, including their identities. They refused to provide such information in response to numerous document requests, multiple sets of interrogatories, and at depositions. Although Dr. Ayash sought the information from all reasonable possible alternate sources by way of document requests, interrogatories, and subpoenas, she could not obtain the information.

In light of Petitioners' refusal to produce the discovery sought, Dr. Ayash moved for an order compelling disclosure of the identity of the source(s). The Superior Court granted that motion on February 23, 1998, employing the balancing test urged by the Petitioners. Resp. App. 17a ("defendants urge the court to prevent discovery based upon a 'balancing between the public interest in every person's evidence and the public interest in protecting the free flow of informa-

---

[2] The Superior Court granted Petitioners' motion for summary judgment on the privacy claim, holding that although "Ayash, at least prior to the disclosures about her, was in no sense a public figure, . . . having been 'drawn into a particularly public controversy,' she arguably became a public figure for a limited range of issues." Resp. App. 10a.

tion"). Finding that "the information was given to Knox over two and a half years ago with respect to an isolated incident" and that "the information sought [was] not cumulative or otherwise available," the court held that the Petitioners had failed to meet their threshold burden under the balancing test urged. It nonetheless continued to consider the remaining factors of the balancing test and found that "Ayash's need for this information is tangible and substantial," that she had "exhausted all reasonable alternative sources for the information," and that the "information which the Globe defendants seek to keep confidential 'relates to the fact issue which is central to the plaintiff's case.'" Resp. App. 18a.

Petitioners sought and obtained an immediate interlocutory appeal. On appeal, the Massachusetts Court of Appeals affirmed the order compelling discovery, finding that Petitioners' "showing fails to establish that the claimed damage to the free flow of information is anything more than speculative and theoretical." Resp. App. 22a. The Appeals Court invited Petitioners on remand to seek a "protective order reasonably limiting, on specified terms and conditions, the use, disclosure, and dissemination of any privileged or confidential information." *Id.*

After the Appeals Court's ruling, Petitioners continued to refuse to produce the requested discovery. Accordingly, Dr. Ayash moved, pursuant to Mass. R. Civ. P. 37, for a finding of civil contempt.[1] On August 13, 1998, the Superior Court granted the motion. Resp. App. 23a-25a. In support of its decision, the Superior Court noted that "although Ayash has agreed to accept a limited protective order and this Court has indicated its willingness to grant such an order, the *Globe* defendants have refused to consider this proposal." Resp. App. 24a. The court further found that Petitioners "have steadfastly refused to provide any discovery

---

[1] The contempt order is *not* the order that is the subject of this Petition.

regarding the purported 'confidential sources' under any circumstances." *Id.* The Superior Court accordingly held Petitioners in civil contempt and imposed a daily escalating fine until such time as Petitioners complied with the order compelling discovery. Resp. App. 25a.

Petitioners sought and obtained interlocutory review of the Superior Court's order holding them in civil contempt. While that appeal was pending, the confidential source who had told Mr. Knox that his statement that Dr. Ayash had countersigned the overdose order was incorrect released him from his pledge of confidentiality.[4] Knox, accordingly, no longer sought to maintain confidentiality with respect to that source. However, Dr. Ayash continued to seek—and Petitioners continued to refuse to produce—the "confidential" source information pertaining to "(1) the information that Ayash was the subject of a Dana-Farber internal "corrective action" investigation; (2) the information that Ayash was the subject of an investigation by the board of registration; and (3) documents provided to Knox concerning recommendations made by Dana-Farber's internal peer review committee and Dana-Farber's responses." Pet. App. 87a.

The Appeals Court held that, although there was no absolute privilege grounded in the Constitution, Petitioners were entitled to the benefit of a balancing test not used for non-media litigants. Specifically, the Appeals Court held that "a party seeking to avoid disclosure must first 'make some showing that the asserted damage to the free flow of information is more than speculative or theoretical." Pet. App. 90a. If such a showing is made, then the court will "balance 'the public interest in every person's evidence and the public interest in protecting the free flow of information,' in order to determine whether disclosure should be prevented." *Id.* Finding that Petitioners had made "some showing" of non-theoretical danger to the free flow of infor-

---

[4] Petitioners' suggestion that Dr. Ayash knew the identity of this source beforehand is incorrect.

mation and that the confidential source information pertaining to the libel claim had now been disclosed, the Appeals Court remanded the issue to the Superior Court for application of the balancing test with respect to Dr. Ayash's remaining claims.[5]

On remand, the Superior Court applied the balancing test required by the Appeals Court. In doing so, it found that the identity of the source who provided Knox with the *Synopsis* and the *Response*

> bears directly on Ayash's claims against Knox for intentional and negligent infliction of emotional distress. . . . Whether Knox engaged in actionable "extreme and outrageous behavior" depends on the methods and circumstances by which he obtained and revealed these documents. The Boston Globe and Knox's refusal to provide any identifying information about the source(s) who provided the Synopsis and the Institute Response severely undermines Ayash's ability to establish the elements necessary to prove her intentional and negligent infliction of emotional distress claims.

Pet. App. 80a.[6] The Superior Court also found that the discovery "b[ore] directly on Ayash's claims against the DFCI defendants":

> Whether the DFCI breached the requirements of its own by-laws regarding confidentiality, whether the DFCI breached the implied covenant of good faith and fair dealing by turning over highly confidential material, and whether the DFCI invaded Ayash's privacy by releasing to the press a docu-

---

[5] Petitioners incorrectly claim that Dr. Ayash had not previously argued that the information was necessary to her non-libel claims. The Appeals Court's decision makes clear that she had indeed done so. *See* Pet. App. 97a.

[6] Petitioners' claim that the "confidential" source information bore only on claims against the DFCI and Dr. Livingston is flatly belied by the record.

> ment which, until that point, was medical peer review material, all depend on whether the source(s) was a DFCI agent or employee.
>
> ... If the DFCI was not the direct or indirect source of the materials which ended up in the possession of Knox, Ayash's claims, to the extent they are dependent on the disclosure of the Synopsis and the Institute Response, will fail. Thus, identification of the source is critical.
>
> The same reasoning holds true with regard to the information concerning the Corrective Action proceedings which were contractually mandated to be maintained in confidence; and, further, to the information regarding the Board of Registration of Medicine, which is required to remain confidential until an advanced phase in the proceedings which has never been reached in the present case. See 243 C.M.R. §1.02(8)(b).

Pet. App. 80a-81a.

While continuing to refuse to comply with the Superior Court's discovery order, Petitioners filed three separate motions for summary judgment. First, Petitioners filed a motion for partial summary judgment seeking a determination that Dr. Ayash was a public figure. Petitioners' repeated claim now that Dr. Ayash was adjudged to be a public figure in the state court proceedings is incorrect and belied by the fact that they filed a motion seeking such a determination. Second, Petitioners filed a motion for summary judgment on the libel claim, arguing that Dr. Ayash would not be able to prove "actual malice" as required of public figure plaintiffs under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Third, Knox filed a summary judgment motion on the emotional distress claim against him, arguing that Dr. Ayash

would not be able to prove that his actions had been "extreme" or "outrageous."[7]

In the meantime, in his resumed deposition Knox volunteered that one of his confidential sources had been a *non-confidential* source on other occasions. Accordingly, Dr. Ayash propounded the following interrogatory:

> Identify each and every source who provided you information between January 1, 1996 and December 31, 1998 without requesting confidentiality or anonymity and who was at the time or in 1995 either an employee or a trustee of the Dana-Farber Cancer Institute.

Knox refused to provide any answer to this interrogatory.

On June 13, 2000, the Superior Court granted Dr. Ayash's motion to compel Knox to answer the interrogatory seeking the identities of non-confidential sources. In ruling on this motion, the Superior Court clearly put Petitioners on notice that, by continuing to defy the court's discovery orders, they were running the risk of entry of a default judgment pursuant to Mass. R. Civ. P. 37(b)(2)(C):

> Knox's failure to reveal his non-confidential sources after being ordered by this Court to do so would permit the plaintiff to request entry of a default judgment against him pursuant to Mass. R. Civ. P. 37(b)(2)(C). . . . Rather than face the prospect of incarceration or a substantial fine, Knox would have to balance his desire to protect the identity of those individuals who have given him non-confidential information against the probability of a default judgment as to liability and a hearing before the court to assess the damages his conduct has caused the plaintiff in this case.

Pet. App. 75a-76a.

---

[7] Because of the subsequent proceedings in the case, the three summary judgment motions were never decided.

Notwithstanding this clear warning of the risks involved, Petitioners chose to continue to refuse to comply with either of the then-governing orders requiring discovery, refusing to produce both the non-confidential and the confidential source information.

On April 2, 2001, the Superior Court ruled on Dr. Ayash's motion for sanctions pursuant to Mass. R. Civ. P. 37 for Petitioners' failure to comply with the court's discovery orders of October 21, 1999 and June 13, 2000. Finding that (a) Petitioners continued to "steadfastly" refuse to produce the required discovery "under any circumstances;" (b) Petitioners refused Dr. Ayash's and the court's willingness to receive the information under the terms of a restrictive protective order; (c) the previously-imposed fines had not been effective at inducing Petitioners' compliance; and (d) Petitioners' refusal to produce the ordered discovery "may also effectively protect the Dana Farber Cancer Institute and David M. Livingston from liability," the court entered a default judgment of liability against the Petitioners as a sanction specifically permitted under Mass. R. Civ. P. 37(b)(2)(C). Pet. App. 71a-73a.

At the same time, the court allowed Petitioners to avoid the sanction at any time:

> The interests of justice will not be adequately served by the mere imposition of a default judgment against the *Globe* defendants, but the court, perhaps naively, clings to the hope that the *Globe* defendants will eventually recognize their continuing legal obligation to permit discovery in this matter and will ultimately comply with Ayash's narrow discovery requests.

Pet. App. 72a. The court's hope proved to be misplaced; Petitioners chose to incur the sanction rather than to comply with the discovery orders. As a result, the issue of damages was tried to a jury for approximately five weeks.

On appeal, and after extensive briefing and argument, the Supreme Judicial Court of Massachusetts affirmed both the discovery orders and the discovery sanction. *See* Pet.

App. 44a-51a. The Supreme Judicial Court determined that the Superior Court had not abused its discretion in ordering the limited discovery sought and had employed the correct balancing test. That test, contrary to Petitioners' assertion, incorporated considerations rooted in the First Amendment and Article 16 of the Massachusetts Constitution:

> We have recognized that values underlying the First Amendment to the United States Constitution and art. 16 of the Amendments to the Massachusetts Constitution may give rise to a common-law privilege that would allow a news reporter to refuse to reveal his sources. In deference to the effect that compelled disclosure has on free speech, and to avoid the "needless disclosure of confidential relationships," our cases require a judge ruling on discovery requests, on a showing that "the asserted damage to the free flow of information is more than speculative or theoretical," to conduct a balancing test between "the public interest in every person's evidence and the public interest in protecting the free flow of information." As has been stated above, the judge carefully performed the balancing test and properly concluded that, in this case, the plaintiff's need for the requested information outweighed the public interest in the protection of the free flow of information to the press.

Pet. App. 50a n.33 (citations omitted).

Among the factors that the Supreme Judicial Court found supported the discovery orders was the fact that "the overdose incidents had occurred over six years previously" and "[t]here [wa]s nothing in the record to suggest that Knox continued to receive or collect information pertaining to the overdoses from these sources that would justify the continued concealment of their identities." Pet. App. 48a. Further, the information withheld "bore directly on the

plaintiff's claims against Knox and Dana-Farber."[8] *Id.* Perhaps most importantly, the Supreme Judicial Court noted the severe prejudice to Dr. Ayash from the Petitioners' refusal to produce the required information:

> As a result of the Globe defendants' refusals to comply with the discovery orders, the plaintiff lost her opportunity to proceed against the defendants on a theory of joint and several liability. Knowledge of who (if anyone) at Dana-Farber had spoken to Knox, and exactly what had been said, could have allowed the plaintiff to bolster her asserted claims or to add new ones.[9]

Pet. App. 49a.

The Supreme Judicial Court also dismissed the case against Dr. Livingston, as to whom the jury had rendered a verdict of $840,000, because of Dr. Ayash's inability to prove that he was a direct or indirect "confidential source."[10] Because the case against Dr. Livingston was dismissed, not remanded, this harm to Dr. Ayash is permanent.

---

[8] In light of this, Petitioners' contention that "the sources' identities were, in the Supreme Judicial Court's words 'peripheral at best' to the legally-deficient non-libel claims for which their disclosure was ordered'" (Pet. 3) is disingenuous at best. The court's view as to the importance of this information explains why the court did not accept Petitioners' assertion that their refusal to comply with the discovery orders was of no legal consequence.

[9] The jury found against Dr. Ayash with regard to joint and several liability, thereby indicating that the Petitioners' non-compliance with the discovery orders was far more than academic.

[10] "The plaintiff alleges that Livingston may have been Knox's 'confidential source' at Dana-Farber who had supplied her name in connection with the announced corrective action proceedings, or who had passed Knox a copy of the hospital's highly confidential Sallan committee synopsis. The plaintiff also suggests that Livingston may have secretly provided to the board of registration a copy of his July 12 letter responding to the committee's corrective action recommendations. These allegations are without support in the record and are far too speculative to form a basis for a finding of improper motive." Pet. App. 43a-44a n.29.

ARGUMENT

I. THE PETITION FOR CERTIORARI RAISES NO IMPORTANT FEDERAL QUESTION

A. Discovery Rulings, Including Those Imposing Default Or Involving Assertions Of A Reporter's Privilege, Do Not Merit Review By This Court

Supreme Court Rule 10 provides that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." There is no question that the Massachusetts courts applied the correct rule of law in this case. Petitioners do not challenge that Massachusetts Rule of Civil Procedure 37 sets out the remedies available to the Massachusetts courts for discovery violations. Nor do Petitioners challenge that Massachusetts Rule of Civil Proceduure 37(b)(2)(C) specifically allows the court to impose as a sanction:

> An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Mass. R. Civ. P. 37(b)(2)(C). There is no exemption, stated or implied, in Rule 37 for parties who happen to be engaged in newspaper work.

The decision as to whether to impose a sanction of default is a fact-based one. As a result, it is reviewed only for abuse of discretion. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (reversing and reinstating order of dismissal under Fed. R. Civ. P. 37), *reh'g denied*, 429 U.S. 874 (1976). The sanctions of dismissal and default, although harsh, "must be available to the district court in appropriate cases, not only to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League*, 427 U.S. at 643;

Roadway Express, Inc. v. *Piper*, 447 U.S. 752, 763-764 (1980).

Because the imposition of a discovery sanction and the ordering of discovery are both fact-based inquiries, this Court has been loathe to grant review—even where the sanction was default or the discovery ordered involved materials for which a claim of reporter's privilege was made. *See, e.g.*, *Miller* v. *United States*, __S. Ct.__, 2005 WL 1121635, 73 U.S.L.W. 3686, 73 U.S.L.W. 3702 (June 27, 2005) (No. 04-1507); *Cooper* v. *United States*, __S. Ct.__, 2005 WL 1121635, 73 U.S.L.W. 3686, 73 U.S.L.W. 3702 (June 27, 2005) (No. 04-1508); *United States* v. *Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Carey* v. *Hume*, 492 F.2d 631 (D.D.C.), *cert. dismissed*, 417 U.S. 938 (1974); *Henry* v. *Sneiders*, 490 F.2d 315 (9th Cir.), *cert. denied*, 419 U.S. 832 (1974).

The same reluctance should hold here because no review is possible without drawing this Court into disfavored review of factual determinations, including those that were the factual predicates underlying the discovery rulings and sanction in this case, such as:

- Petitioners' refusal to produce relevant non-confidential information (which is subject to no legal protection) in addition to relevant information they claimed came from "confidential" sources;
- Petitioners' repeated suggestions to the court that they would not comply with any order compelling disclosure and that no sanction of any sort would cause them to change their position;
- Petitioners' refusal to entertain the option of producing the information under a protective order that would restrict the parties' use of the information and prevent its disclosure outside the litigation;
- Dr. Ayash's need for the information for her claim against Knox who, at the same time that he was refusing to produce the information, was asserting that Dr.

Ayash was required to prove "extreme" and "outrageous" conduct on his part—showings that were extremely difficult without the discovery;

- Dr. Ayash's heightened need for the information in light of Knox's argument that, as a public figure, she was required to meet the heightened proof of "actual malice;"
- Dr. Ayash's need for the information to establish joint and several liability against all defendants, as well as her claims against the DFCI and Dr. Livingston;
- The undisputed unavailability of the information from other sources;
- Dr. Ayash's exhaustion of all reasonable avenues of discovery available to her;
- Petitioners' failure to establish any meaningful threat to the free flow of information were the sources to be disclosed, the overdoses being of purely historical interest at that point and Knox no longer using the sources; and
- The ineffectiveness of lesser sanctions, as demonstrated by the Petitioners' refusal to comply with the sanction imposing a daily escalating fine.

Because granting certiorari would necessarily draw this Court into undesirable review of factual determinations, and those determinations should in any event be left undisturbed in that there is no reason to think that the Massachusetts courts abused their discretion under the rule governing their decisions (*i.e.*, Mass. R. Civ. P. 37), the petition should be denied.

B. The Discovery Rulings Raise No Important Federal Question Concerning The First Amendment

In both the criminal and civil contexts, this Court has held that there is no absolute privilege regarding reporters' sources of information. *Herbert* v. *Lando*, 441 U.S. 153, 160 (1979) (no absolute privilege in civil libel case); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) (no absolute privilege in case in-

volving grand jury). Neither *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), nor its progeny, including *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), "suggest any First Amendment restriction on the sources from which [a] plaintiff c[an] obtain the necessary evidence to prove the critical elements of his cause of action." *Herbert*, 441 U.S. at 160. Although *Herbert* did not involve confidential sources, the principles underlying its decision and those of *Branzburg* (which did involve confidential sources) are equally applicable here. Namely, both cases stand for the proposition that the First Amendment does not afford reporters an absolute privilege or protection from discovery obligations. Both also expressed a strong disfavor for the creation of new evidentiary privileges: "We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." *Branzburg*, 408 U.S. at 690; *see also Herbert*, 441 U.S. at 175 ("Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.... [E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

Petitioners apparently do not seek certiorari in order to establish the existence of an absolute privilege. At least they do not state as much. If they in fact do so, that question has already been decided in *Branzburg* and *Herbert* and need not be revisited.

To the extent Petitioners argue that this Court should grant review in order to address the question of whether a "qualified privilege" shields the discovery of non-confidential and confidential source information, that issue is not presented in this case. Assuming *arguendo* that a qualified privilege were to exist, the Massachusetts courts engaged in the balancing test that such a qualified privilege might require. At both the trial and appellate levels, the Massachusetts courts acknowledged that a "common law privilege"

may apply, and imposed a balancing test between "the public interest in every person's evidence and the public interest in protecting the free flow of information." Pet. App. 50a n.33 (citing *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information*, 395 Mass. 164, 172 (1985)). Thus, as a practical matter, a qualified privileged was in fact applied in this case, raising no important federal question for this Court. In addition, the application of that balancing test was necessarily dependent on factual findings that this Court should and need not review and that do not present or constitute "important federal questions" within the scope of Supreme Court Rules 10(b) & (c).

C. The Discovery Sanction Raises No Important Federal Question Of Due Process Under The Fourteenth Amendment

It has long been established that the imposition of a default judgment with regard to liability does not, as a matter of law, violate due process under the Fourteenth Amendment. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909). Instead, dismissal or default as a sanction for discovery violations is consistent with due process unless "failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958); *National Hockey League*, 427 U.S. at 640 (citing *id.*) (reversing and reinstating Rule 37 discovery sanction of dismissal).

Without explanation, Petitioners ignore *Hammond Packing* and instead choose to reach back to a late nineteenth-century decision, *Hovey v. Elliott*, 167 U.S. 409 (1897). However, the "holding [of *Hovey*] was substantially modified by *Hammond Packing Co. v. Arkansas*, where the Court ruled that a state court, consistent with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order." *Societe Internationale*, 357 U.S. at 209-210.

Although Mass. R. Civ. P. 37(b) is not identical to its federal counterpart, the Supreme Judicial Court has turned to this Court's decision in *Societe Internationale*, 357 U.S. 197 (1958), in guiding the interpretation of the state rule and in holding that—unless the discovery failure is caused by a party's inability to comply—constitutional due process has been satisfied. *Roxse Homes Ltd. P'ship* v. *Roxse Homes, Inc.*, 399 Mass. 401, 405 n.5 (1987). In this case, there is no question that Petitioners' refusal to comply with the discovery orders was willful and not caused in any way by inability to comply.

The fact that Petitioners refused to produce discovery based "upon what [they] deemed to be [their] lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the [law]" does not create a due process issue. *Hammond Packing*, 212 U.S. at 347. This principle is even more apt where, as here, Petitioners refused to produce *non-confidential* source information to which no privilege could or did apply. At bottom, faced with a sanction that at all times lay in their hands to avoid, Petitioners chose instead to incur a default judgment on the issue of liability. That choice does not create a violation of Fourteenth Amendment due process. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (as long as a party is free to accept or reject a choice, there is no violation of due process). As the Supreme Judicial Court found, "[t]his is clearly not a case where the Globe defendants were unable to comply with the orders." Pet. App. 49a n.33.

II. THE SUPREME JUDICIAL COURT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, THE FEDERAL COURTS OF APPEALS, OR THE DECISIONS OF THE HIGHEST COURT OF ANOTHER STATE

A. The Supreme Judicial Court's Decision Does Not Conflict With The Decisions Of This Court

Rather than addressing Massachusetts Rule 37 or its federal analog, both of which are conspicuously absent from the Petition, or even relying on this Court's decisions pertaining to reporters' obligations to produce evidence, Peti-

tioners turn instead to completely inapplicable cases that involve no discovery violations or assertions of a reporter's privilege. Petitioners do so in an attempt to transform this case into one raising constitutional issues that are not, in fact, at issue in this case.

In *Branzburg*, the Court clearly stated that cases involving assertions of a reporter's privilege do not implicate the press's First Amendment rights of publication. Unlike cases involving publication, a claim of reporter's privilege

> involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue.

408 U.S. at 681.

Despite this clear legal distinction between reporters' obligations to produce evidence and the media's right of publication, Petitioners' arguments that a federal question exists and that it was decided in conflict with decisions of this Court, rely heavily and incorrectly on cases dealing solely with the press's rights of publication. Unlike the case at hand, each of the following cases relied on by Petitioners involves the right of publication or speech. *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001) (First Amendment question arising from publication of information was published); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (ordinance restraining showing of movies based on their content), *reh'g denied*, 475 U.S. 1132 (1986); *Consolidated Edison Co. of New York, Inc.* v. *Public Serv. Comm'n of New York*, 447 U.S. 530 (1980) (order restricting political speech from utility bills); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978) (statute criminalizing publication of administrative hearings); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (prior restraint of speech in the form of a movie); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (prior restraint on veterans' speech); *Craig* v. *Harney*, 331 U.S. 367 (1947) (criminal con-

tempt by publication); *Bridges* v. *California*, 314 U.S. 252 (1941) (same).

Petitioners cannot create a question of constitutional dimension by relying on inapplicable decisions: the issue of the right of publication has no place in this case. At all times, Petitioners were free to publish what they wanted, how they wanted, and where they wanted. As such, there is no conflict between the decisions of this Court concerning the content or manner of publication and the decision of the Massachusetts Supreme Judicial Court in this case.

Similarly, no conflict exists with the remaining decisions of this Court relied upon by Petitioners. Not one of those cases involves the assertion of a reporter's privilege, confidential sources, or the imposition of discovery sanctions of any sort. *See Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988) (no issue of reporter's privilege, confidential sources, or discovery sanctions); *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986) (did not reach question of permissible reach of Pennsylvania's shield law); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (no issue of reporter's privilege, confidential sources, or discovery sanctions); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) (same); *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825 (1966) (same); *United States* v. *Bryan*, 339 U.S. 323 (same), *reh'g denied*, 339 U.S. 991 (1950).

Not only do the cases cited not involve the reporter's privilege or discovery rulings, they involve the question of the burden of proof for public figures, a question that was never finally adjudicated in the state court proceedings. Dr. Ayash was never adjudged an unlimited public figure, as demonstrated by the fact that Petitioners filed a summary judgment motion seeking such an adjudication. *See supra* pp. 9-10. No such motion would have been necessary had the issue been finally decided as petitioners now apparently contend. Moreover, the motion was never ruled on because of the subsequent proceedings in the case. *Id.* Petitioners cannot rely on cases discussing the burdens of proof in libel cases where they voluntarily and deliberately chose to forgo

those arguments by defying the trial court's discovery order. There can be and is no conflict where, as here, the legal issue argued by Petitioners was never reached below.

B. The Supreme Judicial Court's Decision Does Not Conflict With The Decisions Of The Federal Courts Of Appeals[11]

1. Assertion of reporter's privilege

Since *Branzburg*, 408 U.S. 665, in 1972, every federal court of appeals has employed, as here, a balancing test in determining whether a reporter's confidential sources must be disclosed in civil litigation. Whether a particular court has read *Branzburg* to create no privilege or to create a qualified privilege, that distinction is one of nomenclature, not substance. Whatever the theory is called, each court has employed a fact-intensive balancing test to determine whether confidential source information should be compelled in the particular circumstances. There is, thus, no conflict because the Supreme Judicial Court performed exactly the type of balancing test performed by the federal courts of appeals:

> In deference to the effect that compelled disclosure has on free speech, and to avoid the "needless disclosure of confidential relationships," our cases require a judge ruling on discovery requests, on a showing that "the asserted damage to the free flow of information is more than speculative or theoretical," to conduct a balancing test between "the public interest in every person's evidence and the public

---

[11] Petitioners rely on several district court cases: *Lacalt* v. *C.K. McClatchy*, 116 F.R.D. 438 (D. Nev. 1987); *Sharon* v. *Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984); *Dowd* v. *Calabrese*, 577 F. Supp. 238 (D.D.C. 1983); *DeRobert* v. *Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981); *Mazzella* v. *Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979). Even assuming that the decision of the Supreme Judicial Court is in conflict with any of these decisions (which it is not), a conflict between a state's highest court and the decision of a federal district court is not a basis for certiorari within the scope of Supreme Court Rule 10.

> interest in protecting the free flow of information." As has been stated above, the judge carefully performed the balancing test and properly concluded that, in this case, the plaintiff's need for the requested information outweighed the public interest in the protection of the free flow of information to the press.

Pet. App. 50a n.33 (citations omitted).

As the following brief survey demonstrates, the balancing test used by the Supreme Judicial Court is entirely consistent with the analyses of the various federal circuit courts:

First Circuit. The First Circuit has quite recently considered the issue of an assertion of reporter's privilege. In *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004),[12] the court reviewed the previous history of this issue within the circuit and held that "[t]he three leading cases in this circuit require 'heightened sensitivity' to First Amendment concerns and invite a 'balancing' of considerations.... In substance, these cases suggest that the disclosure of a reporter's confidential sources may not be compelled unless directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source." *Id.* at 45 (citations omitted). In the civil context, the First Circuit has also employed a balancing test: the "court must balance the potential harm to the free flow of information that might result against the asserted need for the requested information." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980). In that the state trial and appellate courts used this same legal standard, no conflict exists with the decisions of the First Circuit. Moreover, on the facts, Dr. Ayash satisfied the test

---

[12] Counsel of Record for Petitioners was counsel for the reporter in *In re Special Proceedings*, in which an order compelling disclosure was upheld. No writ of certiorari was sought in that case.

employed by the First Circuit: The "confidential sources" were undeniably relevant to claims against Petitioner Knox, the imposition of joint and several liability against all defendants, and to claims against the DFCI and Dr. Livingston. None of the referenced claims was frivolous and all were undertaken in good faith. In addition, the imposition of a default sanction is not in conflict: the First Circuit has affirmed a default sanction in a libel case for failure to produce discovery. *Sirelle* v. *Maloof*, 373 F.2d 520 (1st Cir. 1967).

Second Circuit. The Second Circuit also employs a balancing test, both for the disclosure of confidential and non-confidential sources. *Gonzales* v. *National Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999) (civil suit) (in context of non-confidential sources "the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other sources"); *McGraw-Hill, Inc.* v. *Arizona*, 680 F.2d 5, 7 (2d Cir. 1982) (civil suit involving confidential sources applying fact-based balancing inquiry).

Third Circuit. The Third Circuit also employs a balancing test: "A determination of the specific circumstances in which the privilege will be required to yield to a paramount interest must be made on an *ad hoc* basis.... Therefore, we must balance on the one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand." *Riley* v. *City of Chester*, 612 F.2d 708, 715-716 (3d Cir. 1979) (civil suit).

Fourth Circuit. Similarly, in *Larouche* v. *National Broadcasting Company, Inc.*, 780 F.2d 1134 (4th Cir.) (civil suit), *cert. denied*, 479 U.S. 818 (1986), the Fourth Circuit has held that "[i]n determining whether the journalist's privilege will protect the source in a given situation, it is necessary for the district court to balance the interests involved." *Id.* at 1139.

Sixth Circuit. The Sixth Circuit also employs a balancing test: "[C]ourts should ... follow the admonition of the majority in *Branzburg* to make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony ...." *In re Grand Jury Proceedings*, 810 F.2d 580, 586 (6th Cir. 1987).

Seventh Circuit. A fact-specific inquiry is also adopted in the Seventh Circuit: "It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas." *McKevitt* v. *Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (civil case involving non-confidential sources).

Eighth Circuit. The Eighth Circuit, too, has adopted a fact-intensive inquiry. *See Cervantes* v. *Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972) (discussing various different fact patterns under which decision as to whether to compel disclosure of confidential source information will differ), *cert. denied*, 409 U.S. 1125 (1973).

Ninth Circuit. The Ninth Circuit employs a balancing test. *Shoen* v. *Shoen*, 5 F.3d 1289, 1292-1293 (9th Cir. 1993) ("the process of deciding whether the privilege is overcome requires that 'the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest'"); *Farr* v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (same).

Tenth Circuit. The Tenth Circuit has stated that a balancing test must be employed. *Silkwood* v. *The Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977) (reversing because of "a failure to weigh the various factors" to be employed in balancing the competing interests).

D.C. Circuit. The D.C. Circuit has held that a balancing test should be used in civil cases where an assertion of the reporter's privilege is made: "to determine whether the privilege applies courts should look to the facts of each case,

weighing the public interest in protecting the reporter's sources against the private interest in compelling disclosure." *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

In light of the remarkable consistency among the circuits, and the fact that the decisions at issue in this case employed a similar balancing test, there is no conflict meriting review. To the extent that different courts of appeals have reached different outcomes using a balancing test, that, too, creates no reviewable conflict. The balancing test is necessarily fact-specific and the outcome in each case depends on circumstances particular to each case. Factual differences that lead to different outcomes in the decisions are no basis upon which to grant certiorari.

2. Discovery sanction of default

This case involves the issue of a default judgment entered in a libel case against a defendant for failure to provide discovery on purported First Amendment grounds. The Supreme Judicial Court's decision is entirely consistent with the only federal court of appeals decision Respondent has located that addresses the same issue. In *Adolph Coors Co. v. Movement Against Racism and The Klan*, 777 F.2d 1538 (11th Cir. 1985), the court upheld a default judgment against a libel defendant who had refused to produce court-ordered discovery on the grounds that the information was protected by the First Amendment. Faced, as here, with litigants who repeatedly refused to comply with discovery orders, the court articulated the important interplay between Rule 37 sanctions, the authority of the courts to enforce their orders, and the consequences of continuing to stand by mistaken assertions of privilege:

> Refusal to abide by the law is not cost-free. No litigant and no attorney, even if motivated by misguided perceptions of constitutional privilege, may be permitted to exhibit such contumacious conduct without risk of sanctions under Rule 37. It is manifestly the province and duty of the courts to say what the law is. When parties or lawyers substi-

> tute their own judgments for those of judges, we have not justice but chaos.

Id. at 1543 (citations omitted).

Moreover, the cases relied upon by Petitioners in support of their claim that the decisions of certain circuits regarding default judgments under Rule 37 are not, in fact, in conflict with the decision in this case. This is so because those cases are both legally consistent and factually distinct. *See General Ins. Co. of Am. v. Eastern Consol. Utils.*, 126 F.3d 215 (3d Cir. 1997) (unlike here, discovery was sought from a non-party and was not related to a claim asserted against it); *United States v. Kahalu Constr. Co.*, 857 F.2d 600 (9th Cir. 1988) (unlike here, the discovery sought did not relate to any claim against the party, the conduct was not willful, and lesser alternatives were available); *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985) (unlike in this case, the discovery sought was not related to a claim against the party from which it was sought and the conduct was not willful).

C. The Supreme Judicial Court's Decision Does Not Conflict With The Decisions Of The Highest Court Of Another State

1. Assertion of reporter's privilege

The Supreme Judicial Court's decision is not in conflict with the state court decisions upon which Petitioners rely for three reasons. First, many of the cases to which Petitioners point turn on the existence and provisions of a state "shield" statute. Massachusetts has no shield statute and its legislature has expressly declined to adopt one. Second, no other state's highest court has held, after *Branzburg*, that an absolute privilege for reporters' sources arises from the First Amendment. Instead, the state courts have found either that there is no privilege or that there is a qualified privilege. Neither position presents a conflict with the Supreme Judicial Court's decision because, as stated above, the Massachusetts court applied the balancing test that a qualified privilege would entail should one, *arguendo*, exist.

The Massachusetts legislature has declined to enact a reporters' shield statute. *Petition*, 395 Mass. 164, 168-169 (1985) "It is evident that division exists within the Legislature over whether a reporter's privilege is warranted, and if so, what that privilege should include. Literally dozens of bills have been filed in recent years, with widely varying details. None has attracted the level of support necessary for passage." *Id.* As a result, the decisions of other states interpreting and applying their own state's shield statutes are both inapplicable to, and not in any conflict with, any issue presented here. The Massachusetts legislature having declined to enact a shield statute, the statutes of other states have no place in this case.

Thus, the following cases relied on by Petitioners cannot and do not present a question over which this Court should grant review: *Sands* v. *News Am. Publ'g Inc.*, 161 A.D.2d 30 (N.Y. App. Div. 1990) (decision dependent upon New York's shield statute);[11] *Sprague* v. *Walter*, 543 A.2d 1078 (Pa. 1988) (applying Pennsylvania's shield statute); *Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 464 N.E.2d 967 (N.Y. 1984) (reasoning dependent upon New York's shield statute); *Mitchell* v. *The Superior Court of Marin County*, 37 Cal. 3d 268 (1984) (reasoning based on California's shield statute); *Grand Forks Herald* v. *The District Court*, 322 N.W.2d 850 (N.D. 1982) (case governed by North Dakota's shield statute).

The remaining cases relied upon by Petitioners do not conflict with the decision of the Massachusetts Supreme Judicial Court because either they find that no First Amendment privilege exists (a question that is not raised by the Petition) or they find that a qualified privilege exists requiring application of a fact-specific balancing test.[11] *See Hope-*

---

[11] *Sands* v. *News Am. Publ'g Inc.*, 161 A.D.2d 30 (N.Y. App. Div. 1990), also cannot form the basis for granting certiorari because it is not a decision out of the highest court of the state of New York.

[11] In addition, Petitioners rely on three decisions from the intermediate courts of California and Georgia. *Atlanta Journal-Constitution* v.

well v. *Midcontinent Broad. Corp.*, 538 N.W.2d 780 (S.D. 1995) (qualified privilege requiring application of a multi-factor fact-specific test), *cert. denied*, 519 U.S. 817 (1996); *State of West Virginia* v. *Henry*, 182 W. Va. 500 (1990) (balancing test under a theory of qualified privilege); *Downing* v. *Monitor Publ'g Co.*, 415 A.2d 683 (N.H. 1980) (no First Amendment privilege); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977) (qualified privilege requiring application of a fact-specific balancing test), *cert. denied*, 436 U.S. 905 (1978); *Gagnon* v. *The District Court*, 632 P.2d 567 (Colo. 1981) (no First Amendment privilege).

2. Discovery sanction of default

No conflict exists with respect to the decisions concerning default judgments of the Supreme Court of Washington and of the Supreme Court of Idaho upon which Petitioners rely. *Sierra Life Ins. Co.* v. *Magic Valley Newspapers, Inc.*, 101 Idaho 795 (1981); *Mitchell* v. *Watson*, 58 Wash. 2d 206 (1961). Both cases turned on a circumstance not present here: that the discovery sought was not related to a claim against the party refusing to produce it.[15] In stark contrast, the discovery sought in this case bore directly on claims against Petitioners and the evidence necessary to prove them. Specifically, as found repeatedly by the state and appellate courts, the discovery was necessary to Dr. Ayash's emotional distress claim against Petitioner Knox. It was particularly necessary because Knox argued that Dr. Ayash

---

Jewell, 251 Ga. App. 808 (2001), *cert. denied*, 537 U.S. 814 (2002); *Dalitz* v. *Penthouse Int'l, Ltd.*, 168 Cal. App. 3d 468 (1985); *Caryl Richards, Inc.* v. *Superior Court*, 188 Cal. App. 2d 300 (1961). Even assuming a conflict between the decision in this case and those of the intermediate courts of others (which does not, in fact, exist), such a conflict is not a basis for granting certiorari under Supreme Court Rule 10. Moreover, *Caryl Richards*, 188 Cal. App. 2d 300, is a pre-*Branzburg* decision finding no reporter's privilege exists. It is irrelevant for that reason as well.

[15] *Mitchell* v. *Watson*, 58 Wash. 2d 206 (1961), is also incorrectly decided in that it misreads *Hovey* v. *Elliot*, 167 U.S. 409 (1897), in light of this Court's subsequent clarification of that opinion in *Societe Internationale*, 357 U.S. at 212.

was required, and would fail absent such evidence, to prove "extreme" and "outrageous" conduct sufficient to support the claim against him. In addition, without the evidence that the Petitioners withheld, Dr. Ayash was unable to prove her claim of joint and several liability among all defendants, including both of the Petitioners.

CONCLUSION

For the reasons set forth above, Dr. Ayash respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOAN A. LUKEY
Counsel of Record
GABRIELLE R. WOLOHOJIAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

JULY 2005

APPENDIX A — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED JULY 8, 1997

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-0565E

LOIS AYASH, M.D.,

V.

DANA-FARBER CANCER INSTITUTE,
DAVID M. LIVINGSTON,
THE BOSTON GLOBE, AND
RICHARD A. KNOX

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS GLOBE NEWSPAPER COMPANY AND RICHARD A. KNOX'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT VII OF THE COMPLAINT

This motion for partial summary judgment, part of a case involving, *inter alia*, allegations of libel and invasion of privacy arising from intense publicity over medical errors that led to the death of a patient at a prestigious Boston hospital, raises difficult issues of media law: when is an event "newsworthy," and when can this issue be decided by the court as a matter of law?

For the reasons that follow, the court concludes that the events reported in the media accounts at issue were indeed newsworthy as a matter of law. Accordingly, the court allows the motion of defendants *The Boston Globe* ("the Globe") and Richard A. Knox ("Knox") for summary judgment on the claim of plaintiff Doctor Lois Ayash ("Ayash") for invasion of privacy (Count VII of the Complaint).

Appendix A

BACKGROUND

On December 3, 1994, Betsy Lehman ("Lehman"), a columnist for the Globe, died at the Dana Farber Cancer Institute ("Dana Farber"). Lehman was a patient in an experimental breast cancer treatment protocol ("the protocol") for women whose cancers had not been responsive to more traditional forms of treatment. The protocol was designed to test on women the efficacy and safety of high doses of cyclophosphamide, a drug used in chemotherapy. The plaintiff in this action, a physician at Dana Farber, was Protocol Chair, which gave her responsibilities relating primarily to the research aspects, as opposed to the clinical management, of the protocol.

In February 1995, a data clerk at Dana Farber discovered that Lehman and another patient in the protocol had accidentally been given overdoses of cyclophosphamide in November 1994. Due to a physician's error in interpreting protocol doses, the two patients were given four times the prescribed dose. Dana Farber officials, following this discovery, suspended the clinical privileges of two physicians who had been directly involved with the treatment of the two patients when the overdoses occurred. Both physicians were also placed on administrative duty. No action was taken then against Ayash, who did not have any direct clinical responsibilities for the patients at the time of the overdoses.[1]

On March 23, 1995, defendant Knox, a reporter for the Globe, published an article in that newspaper pertaining to the overdoses given to Lehman and the other patient. The article identified Ayash as both "the leader of the team" and

---

[1] Ayash did rotate into the clinical role of attending physician for Lehman and the other patient on December 1, 1994. Although Lehman had suffered an adverse reaction to the cyclophosphamide treatment, Ayash did not discover that the overdoses had occurred.

a co-signatory of the order which led to the overdoses, and implied Ayash had been placed on administrative duty. As stated above, Ayash was not the clinical "leader" of the program; nor did she co-sign the overdose order. Another Knox article appeared on March 26, 1995. Additionally, Globe editorials were published which excoriated Dana Farber and its physicians for the overdoses.

On March 31, 1995, Dr. Ayash's clinical privileges were suspended and she was assigned to administrative duty. Additionally, two internal Dana Farber investigations of her conduct began. On May 2, 1995, Knox published an article in the Globe stating that Ayash and another physician had been "singled out in an internal disciplinary process launched last month by Dana Farber." On June 4, 1995, the Globe published a "correction", stating that Ayash had been erroneously identified in the original Knox article as having countersigned the overdose order.

Another Knox article appeared on October 31, 1995, which discussed internal Dana Farber documents relating to the investigations of the overdoses. Although Dana Farber had publicly released some materials relating to the investigations, Knox's article also stated that a non-public summary of an internal investigation had been "obtained by the Globe." The article also stated that Ayash was under investigation by the Massachusetts Board of Registration in Medicine.

In August 1995, Ayash received an oral reprimand by the president of Dana Farber for her alleged failure to detect the overdoses earlier than the point at which they were discovered.

DISCUSSION

Summary judgment must be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Na-*

tional Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the moving party is entitled to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). With respect to any claim on which the party moving for summary judgment does not have the burden of proof at trial, it may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); accord, *Kourouvacilis v. General Motors Corp.* 410 Mass. 706, 716 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment." *Pederson v. Time, Inc.*, 404 Mass. at 17. The opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989).I.

The Globe has moved for summary judgment on Ayash's invasion of privacy claim brought under G.L. c. 214, § 1B (Count VII). The tort of invasion of privacy is of relatively recent vintage, and has been called "one of the most noteworthy legal inventions of the 20th Century." *The Florida Star v. B.J.F.*, 491 U.S. 524, 550 (1989) (White, J. dissenting). The development of a legal action for public exposure of private, personal facts is traced to an article by Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890). Another landmark in the development of this tort came with the publication of Dean Prosser's "Privacy," 4 Cal. L. Rev. 383 (1960), which dis-

cussed what are now recognized as the four types of invasion of privacy. See also Restatement of Torts, 2d, § 652A.[2]

Massachusetts has codified the right to privacy in G.L. c. 214, § 1B, which creates a right "against unreasonable, substantial or serious interference" with a person's privacy. Although the Supreme Judicial Court has never decided whether or not to recognize a common law invasion of privacy right, see *Alberts v. Devine*, 395 Mass. 59, *cert. denied*, 474 U.S. 1013 (1985), c. 214, § 1B is considered roughly analogous to the common law category which proscribes public disclosure of private facts. Restatement of Torts, 2d, § 652A(2)(c); *Bratt v. International Business Machines Corp.*, 392 Mass. 508, 519, n.15 (1984).

A.

In her brief, Ayash asserts that her claim belongs to the public disclosure species of invasion of privacy, which makes actionable disclosures of private, intimate facts about an individual that are not in any sense the business of the public or newsworthy. *Doe v. Town of Plymouth*, 825 F.Supp. 1102, 1109 (D.Mass. 1993) (disclosure of HIV status actionable). A disclosure is an invasion of privacy where private facts are revealed that would be offensive to a reasonable person and where the public has no legitimate interest in the facts being disclosed. *Id*; Restatement of Torts, 2d, § 652D. "When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy." Restatement of Torts, 2d, § 652D, comment d. Thus, in cases involv-

---

[2] The four categories of invasion of privacy recognized by the restatement are:

(a) Unreasonable intrusion upon the seclusion of another;
(b) Appropriation of the other's name or likeness;
(c) Unreasonable publicity given to the other's private life;
(d) Publicity that unreasonably places the other in a false light before the public.

Restatement of Torts, 2d, § 652A(2).

ing the media, "newsworthiness" is a complete defense to an invasion of privacy action, even if the plaintiff establishes that private, offensive facts about her have been disclosed. *See, e.g, Gilbert v. Medical Economics Co.*, 665 F.2d 305, 309 (10th Cir. 1981); *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 74 (1979), *cert. denied*, 444 U.S. 1060 (1980).

The Massachusetts appellate courts have had limited opportunities to address invasion of privacy claims brought against the media. In *Cefalu*, 8 Mass. App. Ct. 71, the Appeals Court held that a news photograph of a man in an unemployment line was as matter of law of public interest, and that summary judgment was proper on the man's invasion of privacy claim against the Globe. However, *Cefalu* is distinguishable from the present case in important respects; there, the plaintiff was photographed in a public place, lending strength to the argument that the matter was of public interest. Here, by contrast, some of the information published about Ayash was both generated in private and was legally privileged.

Cefalu does not outline a test for assessing newsworthiness. Nor is the court prepared to find on the authority of *Cefalu* that newsworthiness is invariably a question of law, even though summary judgment was granted in that case. Faced with an absence of state authority on this important question of media law, the court will examine the decisions of other jurisdictions and attempt to formulate a reasoned test for assessing newsworthiness.

B.

In addressing the preliminary matter of whether newsworthiness is a question of fact or of law, the court notes that summary judgment is favored in cases involving the right of media to publish information, "because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights." *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 1046 (1984). This may be especially true in a "public disclosure" privacy action,

which is notably different from a defamation action, the other main legal recovery route for disclosures in newspapers, in that it permits recovery for truthful disclosures. *Romaine v. Kallinger*, 537 A.2d 284, 292 (N.J. 1988). A review of cases from other jurisdictions shows that the issue of newsworthiness has been treated of one of either fact or law depending on the circumstances presented. *See, e.g, Virgil v. Time*, 527 F.2d 1122, 1130 (9th Cir. 1985); *Gilbert*, 665 F.2d at 309. Thus, whether newsworthiness is a question for the judge or the jury depends upon the weight of the summary judgment record. Where material facts are in dispute, or where the facts present a particularly close question as to newsworthiness, summary judgment is inappropriate. As in other cases, the initial determination of whether or not a factual question exists is for the court. *Virgil*, 527 F.2d at 1130.

Turning to the issue of a legal test for assessing the newsworthiness of disclosed private facts, it is clear that establishing viable doctrine in this *area has not been an easy task. See "Trafficking in Stolen information,"* 105 Yale Law Jrn. 727, 732 (1995) (criticizing courts' tests for determining newsworthiness as inconsistent and incoherent).

One of the ironies of this case and others like it is that the newsworthiness of private facts is invariably assessed by courts after those facts have been trumpeted by the news media. Indeed, it is almost a truism that the newsworthiness of a person or event can be fostered, if not created, by news reporting rather than as a result of any intrinsic public interest in the person or event:

> Pushed to the extreme, the newsworthiness defense engulfs the tort of public disclosure, because, to a large extent, the media themselves determine what is newsworthy.

"Tort of Public Disclosure," 1990 Wisc. Law. Rev. 1107, 1121.

However, the court also notes that the media's privilege to publish newsworthy matters is not only an immunity accorded by the common law, but also one of constitutional di-

mension based upon the First Amendment of the United States Constitution. *Sipple*, 154 Cal. App. 3d at 1046; Restatement of Torts, 2d, § 652E, comment d. Thus, courts have generally concluded that publishers, not judges or juries, are the appropriate judges of what is newsworthy. *Heath v. Playboy Enterprises*, 732 F. Supp. 1145, 1149 (S.D. Fla 1990). "Only in cases of flagrant breach of privacy . . . or obvious exploitation of public curiosity . . . should a court substitute its judgment for that of the publisher." *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So. 2d 328, 331 (Fla. App. 1983).

In assessing newsworthiness, courts examine the subject the news report at issue and the logical nexus between this subject and any private facts revealed about the plaintiff. *See, e.g. Virgil*, 527 F.2d at 1130-1131 (general subject of body surfing in article was newsworthy, but factual question existed as to whether "bizarre" and unrelated facts disclosed about plaintiff were newsworthy); *Gilbert*, 665 F.2d. at 309 (policing medical profession newsworthy).

After a review of cases from other jurisdictions, the court adopts the following test: disclosures of truthful, private facts are newsworthy, as matter of law, where (a) the general matter at issue is one that is typically of public concern, and (b) the private facts disclosed are closely related to that matter of public concern.

C.

Turning to the present case, the defense of newsworthiness arises only if Ayash can meet her prima facie case by showing that private facts were disclosed about her that would be offensive to a reasonable person. The court finds an issue of material fact on these matters. At least some of the information disclosed about Ayash came from internal Dana Farber documents that are by law confidential. Certainly, facts in such documents could be found to be "private." *See Virgil*, 527 F.2d at 1130-1131.

Appendix A

The court also finds a factual question regarding whether a reasonable person would have been offended by the disclosures that occurred. Certainly, a jury could find that Ayash was reasonably distressed and offended by at least some of the information published about her. Damaging, employment-related information about Ayash -- again, some of it from legally privileged documents -- was placed directly in the public eye. *See, e.g, Cape Publications, Inc. v. Bridges*, 423 So.2d 426, 427-428 (release of nude picture could have been distressing to crime victim). Under the circumstances, Ayash reasonably could have been offended by the disclosures.

Since issues of material fact exist as to whether Ayash can establish a *prima facie* case of "public disclosure" invasion of privacy, the court must now address whether the newsworthiness defense nevertheless allows disposition her privacy claim as a matter of law. First, the court must assess whether the general subject at issue in the reports about Ayash is one that is typically of public concern. This determination is complicated in the present case by the fact that Lehman was herself a reporter for the Globe. Ayash asserts -- with good reason -- that Lehman's association with the Globe prompted unusually intense media interest in the case. Certainly the editorials and columns about the Lehman case were highly personalized, and reflected the anguish of other Globe staffers over Lehman's death.[4] Even Knox's news accounts, and the headlines placed over them,

---

[4] Globe columnist Bella English wrote of the incident:

> Betsy should be alive today... Young women ordinarily do not die of cardiac arrest... The sheer incompetence takes your breath away. Let's start with the incompetence, which is nothing less than criminally negligent homicide. The staffers with their fingerprints on this death ... killed Betsy just as surely as if some driver had rune a stop sign and hit her.

at times lacked the dispassion that is supposed to be the hallmark of quality journalism.[1]

However, there is no evidence that absent Lehman's involvement in the story, the Globe would not have zealously pursued it. Regardless of who may have died at Dana Farber as a result of this incident, the events have been of public interest. Deficiencies in health care are generally a matter of public concern. *Gilbert*, 665 F.2d. at 309 (policing medical professional newsworthy). *See also ELM Medical Laboratory, Inc. v. RKO General, Inc.*, 403 Mass 779, 782-783 (1989). The stories which mentioned Ayash focused on two major, life threatening errors at a renowned cancer research center. The court concludes, as a matter of law, that the general subject of the reports that mentioned Ayash was of public concern.

Turning to the second prong of the newsworthiness test, the court also determines, as a matter of law, that the specific facts disclosed about Ayash were closely related to the matter of public concern discussed in the articles. Certainly, a relevant factor in considering this prong is whether the individual involved is one who typically receives public attention. Ayash, at least prior to the disclosures about her, was in no sense a public figure. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1973). However, having been "drawn into a particular public controversy," *id.* at 351, she arguably became a public figure for a limited range of issues. The reportage on her did not go beyond the scope of those issues. No lurid or extraneous details about her were disclosed. The reports focused only on the degree to which she was allegedly professionally involved in the errors at Dana Farber.

In sum, the Globe has met its burden of showing an absence of any factual dispute regarding whether the informa-

---

[1] The headline in the original Knox story read, "Doctor's orders killed cancer patient."

tion disclosed about Ayash was newsworthy. Neither the general subject discussed in the reports nor the specific facts disclosed about Ayash were in any sense far afield from issues of public concern. The information was newsworthy as a matter of law, and no invasion of privacy action may lie against the Globe.

D.—

Ayash, in an additional effort to establish either a common law invasion of privacy action or a G.L. c. 214, § 1B claim, makes the intriguing argument that since a violation of G.L. c. 111, § 204, the medical peer review statute, occurred in this case, there is a factual question as to whether a substantial invasion of privacy occurred.

Paragraph (a) of G.L. c. 111, § 204, erects a general shield of confidentiality for "proceedings, reports and records of a medical peer review committee." This statute was passed in order to foster "rigorous and candid evaluation of professional performance by a provider's peers." *Swatch v. Treat*, 41 Mass. App. Ct. 559, 561 (1996); *Beth Israel Hosp. Assn. v. Board of Registration in Medicine*, 401 Mass. 172, 182-183 (1996). The statute provides that the work product of a medical peer review is "confidential, and shall not be subject to subpoena or discovery, or introduced into evidence."

The language of the statute, as well as case law construing it, demonstrates that its purpose was to make medical peer review material privileged and not discoverable in litigation. The statute precludes medical institutions from releasing internally generated materials and prohibits outside parties from obtaining such materials through legal mechanisms such as discovery.

Ayash contends that when medical peer review material is obtained and disseminated by a newspaper reporter, the reporter has violated G.L. c. 111, § 204. By extension, she argues, the dissemination of such statutorily protected ma-

terial constitutes an invasion of privacy and thus a violation of G.L. c. 214, § 1B.

Absent this sort of implied private right of action, Ayash argues, the statute is rendered toothless; for example, a hospital official who releases peer review material in violation of the statute faces absolutely no sanction, and any third party (e.g., a reporter) who disseminates this information likewise faces no adverse consequences.

The court disagrees that with the view that absent a private right of action, the statute is a near nullity. This particular statute -- like several others in the Commonwealth -- makes a certain category of information privileged and hence immune from discovery. The Legislature, had it intended either a specific sanction for a statutory violation or a private right of action to exist, could have so provided. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1977) (Virginia statute made it criminal offense to divulge information relating to a particular state commission).[5] Further, even absent either of these remedial avenues, the statute gives medical institutions the powerful ability to keep their peer review materials from potential litigants. This is appropriate, since the statute was passed "in response to a perceived medical malpractice crisis." *Beth Israel*, 401 Mass. at 173.

Further, Ayash's argument is foreclosed by *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1977). There, the Supreme Court found unconstitutional a statute making it a misdemeanor to publish information regarding proceedings before a state judicial review committee. Just

---

[5] However, as discussed below, a statute that allowed either a criminal or civil remedy against a third party (*e.g.*, a newspaper reporter) who disclosed confidential, but lawfully obtained governmental information, would likely be unconstitutional. The Virginia statute in *Landmark* was voided by the Supreme Court on the grounds that it violated the media's First Amendment rights.

as the Landmark criminal statute was found to have an unconstitutionally chilling affect on the media's First Amendment rights, the civil remedy sought by Ayash would have the same effect. The following language from Florida Star, 491 U.S. at 534, where the Court declared void as unconstitutional an action against a newspaper for publishing lawfully obtained information, is also instructive:

> To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and *extend a damages remedy against the government or its officials* where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, *a less drastic means than punishing truthful publication* almost always exists for guarding against the dissemination of private facts.

Florida Star, 491 U.S. at 534 (emphasis added). *Cf. Time v. Hill*, 385 U.S. 374 (1967) (applying Constitutional standards for libel claims to false light invasion of privacy action).

The court declines to recognize a private right of action against a third party who obtains and disseminates material covered by the medical peer review statute.

E.

Although not raised in her brief, Ayash spent considerable time at oral argument advocating a "false light" invasion of privacy theory. See Restatement of Torts, 2d, § 652A(d). A false light invasion of privacy action is quite similar to a defamation action, in that it seeks to recover for the publication of erroneous or misleading information. However, Massachusetts has not recognized the false light

category of the invasion of privacy tort. *ELM Medical*, 403 Mass. at 787.

This court also declines to do so. Ayash's false light invasion of privacy claim is, the circumstances presented, essentially duplicative of her defamation claim. She seeks damages for allegedly false information printed in the Globe about her. *See Grimsley v. Guccione*, 703 F. Supp. 903 (M.D. Ala. 1988) (no false light action allowed where defamation action existed). There is no compelling need for the court to recognize the false light theory in this case.

ORDER

For the foregoing reasons, Defendants Globe Newspaper Company and Richard A. Knox's Motion for Summary Judgment as to Count VII of the Complaint is **ALLOWED.**

s/ Peter M. Lauriat
Peter M. Lauriat
Justice of the Superior Court

Dated: July 8, 1997

APPENDIX B – MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED FEBRUARY 23, 1998

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-0565E

LOIS AYASH, M.D.,

V.

DANA-FARBER CANCER INSTITUTE,
DAVID M. LIVINGSTON,
THE BOSTON GLOBE, AND
RICHARD A. KNOX

MEMORANDUM OF DECISION AND ORDER ON (1) PLAINTIFF'S MOTION TO COMPEL THE BOSTON GLOBE AND RICHARD A. KNOX TO PROVIDE DISCOVERY REGARDING PURPORTED "CONFIDENTIAL SOURCES" AND (2) DEFENDANTS THE BOSTON GLOBE AND RICHARD A. KNOX'S MOTION FOR PROTECTIVE ORDER

Lois Ayash, M.D. ("Ayash") has moved to compel the Boston Globe and Richard A. Knox (collectively, "the Globe defendants") to provide discovery pursuant to her interrogatories, requests for the production of documents, and deposition questions. The Globe defendants oppose this motion and have moved for a protective order, asserting that the discovery which Ayash seeks is protected by the common law, Mass. R. Civ. P. 26(c), the First Amendment and Article 16 of the Massachusetts Declaration of Rights. After hearing arguments, and upon review of the parties' submissions, Ayash's motion is allowed and the Globe defendants' motion is denied.

Appendix B

BACKGROUND

In November of 1994, Betsy Lehman ("Lehman") and another patient at Dana Farber Cancer Institute ("the Institute") were accidentally given chemotherapy overdoses. On December 3, 1994, Lehman died as a result of this error. The Globe printed several articles, written by Knox, regarding Lehman's death. Most notably, in an article published on March 23, 1995, Knox wrote: "Five or six other doctors and nurses countersigned the mistaken order, including Dr. Lois J. Ayash, leader of the team."

Ayash has brought claims against the Globe defendants for defamation and invasion of privacy as a result of these stories.[1] Ayash alleged that these articles contained false and damaging statements about her and her role in Lehman's overdose and death. Knox admitted in his deposition that he knew within four days of the initial publication that Ayash did not countersign the overdose orders. However, the Globe did not publish a correction until June 4, 1995.

In the course of discovery, Ayash has sought the production of documents, answers to interrogatories, and deposition testimony from the Globe defendants with respect to the source or sources of the information underlying the articles. The Globe defendants have categorically refused to provide any documents, answers, or testimony as to the source of their information, asserting a confidential source privilege.

Ayash has now moved to compel this disclosure, asserting that no recognized privilege exists which protects the information sought. In response, the Globe defendants have moved for a protective order, contending that Ayash's need for this information is outweighed by the potential harm to the public interest in the free flow of information.

---

[1] The court (Lauriat, J.) granted summary judgment in favor of the Globe defendants on the invasion of privacy claim on July 9, 1997.

Appendix B

DISCUSSION

I. Ayash's Motion to Compel

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Mass. R. Civ. P. 26(b). This discovery includes information which, even if inadmissible at trial, appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* News reporters do not have a constitutionally based privilege which protects their sources of information. *In the Matter of a John Doe Grand Jury Investigation*, 410 Mass. 596, 598 (1991) (citations omitted). Nor is there any statutory privilege or rule of court providing such a privilege. *Id.* Nonetheless, defendants urge the court to prevent discovery based upon a "balancing between the public interest in every person's evidence and the public interest in protecting the free flow of information." *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information*, 395 Mass. 164, 172 (1985); see also *John Doe*, 410 Mass. at 600.

Before the court will undertake such a balancing test, the Globe defendants, as the parties seeking to prevent disclosure, have the burden of showing that the asserted damage to the free flow of information is more than speculative or theoretical. *John Doe*, 410 Mass. at 600 n.l; *Sinnott v. Boston Retirement Board*, 402 Mass. 581, 586 (1988); *Petition for the Promulgation of Rules*, 395 Mass. at 172. The Globe defendants argue that compelling disclosure of Knox's source or sources would infringe upon the values protected by the First Amendment. *Sinnott*, 402 Mass. at 586. However, in this case the court concludes that allowing Ayash's discovery requests would not have the chilling effect on the free flow of information that the Globe defendants fear.

This is not a case where the informant continues to provide information to a reporter or the investigation is ongoing. Cf. *Id.* at 587 & n.5. Rather, the information was given

to Knox over two and a half years ago with respect to an isolated incident, to wit, the overdosing of two chemotherapy patients. Also, the information sought is not cumulative or otherwise available. Cf. *John Doe*, 410 Mass. at 600 (on balance, production of reporters' sources unnecessary in grand jury proceeding where district attorneys knew of all sources of the information). The Globe defendants have thus failed to meet their burden of showing that the potential harm to the free flow of information is neither speculative nor theoretical. Accordingly, the court is not required to perform the balancing test asserted by the Globe defendants. *Sinnott*, 402 Mass. at 586.

Even if the Globe defendants had met their burden, the court would find that Ayash's need for this information is tangible and substantial and thus outweighs the risk of harm to the free flow of information to the press. Ayash has, despite the Globe defendants' contrary view, exhausted all reasonable alternative sources for the information. Id. at 587. Also, the Globe defendants' contention that Ayash should continue to seek the information from alternate sources places an undue burden on Ayash. *Id.*; *Petition for the Promulgation of Rules*, 395 Mass. at 171.

Finally, in libel cases especially, disclosure is required because discovery of the sources of the allegedly libelous statement is central to plaintiff's claim. *Dow Jones & Co., Inc. v. Superior Court*, 364 Mass. 317, 319 (1973). Additionally, the information is sought from a party to the action and the information which the Globe defendants seek to keep confidential "relates to the factual issue which is central to the plaintiff's case." *Id.* at 322. On balance, then, the court concludes that Ayash's right to disclosure of the requested information from the Globe defendants in this case outweighs any potential harm to the free flow of information. Ayash's motion is therefore allowed.

Appendix B

II. The Globe and Knox's Motion for a Protective Order

In light of the court's ruling that Ayash is entitled to discover the source or sources of the Globe defendants' information, and that such discovery is not protected by any privilege, the Globe defendants' motion for a protective order must be denied.

ORDER

For the foregoing reasons, (1) Plaintiff's Motion to Compel the Boston Globe and Richard A. Knox to Provide Discovery Regarding Purported "Confidential Sources" is **ALLOWED** and (2) Defendants the Boston Globe and Richard A. Knox's Motion for Protective Order is **DENIED.**

s/Peter M. Lauriat
Peter M. Lauriat
Justice of the Superior Court

Dated: February 23, 1998

APPENDIX C – ORDER OF THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED APRIL 13, 1998

APPEALS COURT
NO. 98-J-211

LOIS AYASH

V.

DANA-FARBER CANCER INSTITUTE & OTHERS

ORDER

The petition of the defendants Globe Newspaper Company and Richard Knox, pursuant to G. L. c. 231, § 118, par. 1, seeking reversal of, or leave to take an interlocutory appeal from, the February 23, 1998, orders of a judge of the Suffolk Superior Court (a) allowing the plaintiff Lois Ayash's motion to compel the petitioners to provide discovery regarding purported "confidential sources" and (b) denying the petitioners' motion for a protective order, is hereby denied.

It is not the function of the single justice to second-guess or displace the exercise of the very extensive discretion possessed by trial judges in all matters of pretrial management, the exemplars of which are the scope and conduct of discovery. The only significant exception to that fundamental policy occurs when a petitioner asserting a recognized privilege convincingly demonstrates to the single justice that the judge below committed an abuse of discretion of such a clear and egregious sort -- essentially amounting to an irrational ruling unsupportable on any reasonable basis -- that the privilege has been or will be irreparably impaired to the substantial detriment both of the petitioner and the public interest.

Substantially persuaded by the reasoning contained in the judge's memorandum of decision and the arguments set forth at pages 4-15 of the plaintiff's opposition to the petition, I conclude that the petitioners' showing here falls far short of that stringent standard. Particularly in light of the

petitioners' repeated assertions that there are no confidential sources to disclose with respect to the statements alleged by the plaintiff to have been defamatory, their showing fails to establish that the claimed damage to the free flow of information is anything more than speculative and theoretical.

To the extent the form of protective order proposed by the petitioners' motion below (which does not appear in the record before the single justice) simply prohibited all of the discovery sought to be compelled by the plaintiff, for denial of that motion occasioned no error or abuse of discretion, for the reasons discussed above. The instant order of the single justice is, however, without prejudice to the petitioners' making a more focused motion in the Superior Court for a more narrowly tailored protective order reasonably limiting, on specified terms and conditions, the use, disclosure, and dissemination of any privileged or confidential information produced in compliance with the February 23, 1998, order.

Finally, the petitioners have presented insufficient reasons for the single justice to authorize the greatly disfavored and infrequently allowed relief of leave to prosecute an immediate interlocutory appeal, particularly failing to demonstrate that this case qualifies as one of the extraordinary situations warranting a rare exception to that long-standing policy of this court. Indeed, as the plaintiff's opposition observes (at pages 6-7), the petitioners have it within their own power to obtain the right of immediate appeal.

So ordered.
By the Court (Laurence, J.),

Assistant Clerk

Entered: April 13, 1998.

APPENDIX D – ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED AUGUST 13, 1998

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-0565E

LOIS AYASH, M.D.,

V.

DANA-FARBER CANCER INSTITUTE,
DAVID M. LIVINGSTON,
THE BOSTON GLOBE, AND
RICHARD A. KNOX

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO RULE 37 AGAINST THE BOSTON GLOBE AND RICHARD KNOX

> "No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor."
>
> -Theodore Roosevelt

The plaintiff, Lois Ayash, has moved, pursuant to Mass. R Civ. P. 37(b), for the imposition of sanctions against the Boston Globe newspaper and its reporter, Richard Knox ("Knox") (collectively, "the Globe defendants"), for their failure to comply with this Court's discovery order dated February 23, 1998. On that date, the Court allowed the plaintiff's motion to compel discovery and ordered the Globe defendants to provide discovery regarding the purported "confidential sources" relied upon by Knox in a series of articles which appeared in March of 1995; the articles, authored by Knox, concerned the death of Boston Globe reporter Betsy Lehman from an accidental chemotherapy overdose that she received while a patient at the Dana Farber Cancer Institute. The Court also denied the Globe defendants' mo-

tion for a protective order. A single justice of the Appeals Court, relying on the reasoning in the Superior Court decision, affirmed both orders. He also affirmed without prejudice the denial of the Globe defendants' motion for a protective order so as to allow the Globe defendants an opportunity to submit a more narrowly framed protective order to the Superior Court.

Subsequent to the Appeals Court decision, the plaintiff resumed her deposition of Mr. Knox, and pursuant to the order to compel discovery, questioned Mr. Knox regarding his "confidential sources." Mr. Knox declined to reveal the purported "confidential sources" or any information which might have led to discovery of those sources. The Globe defendants have steadfastly refused to provide any discovery regarding the purported "confidential sources" under any circumstances.[1] The Court finds that their ongoing refusal to comply with the February 23, 1998 discovery order constitutes a contempt of court and renders the Globe defendants subject to sanctions under Mass. R Civ. P. 37(b).

In fashioning a sanction for civil contempt, a court has the power to impose a prospective daily fine in order to coerce a defendant into complying with the court's order. See Labor Relations Comm'n v. Fall River Educators' Assn., 382 Mass. 465, 476 (1981). The purpose of a prospective daily fine in this case would be to coerce Mr. Knox and the Boston Globe into providing discovery regarding the purported "confidential sources" pursuant to the terms of the February 23, 1998 order. See id. To that end, this Court issues the following order:

---

[1] For example, although Ayash has agreed to accept a limited protective order and this Court has indicated its willingness to grant such an order, the Globe defendants have refused to consider this proposal.

Appendix D

ORDER

This Court hereby ORDERS that, commencing, Monday, August 24, 1998, defendant Richard Knox is to pay to the Suffolk County Superior Court Civil Clerk the sum of $100.00 per day unless and until he complies with the Court's discovery order of February 23, 1998. Commencing August 31, 1998, the required payment will increase to $200.00 per day. Commencing September 7, 1998, the required payment will increase to $300.00 per day. Commencing each Monday thereafter, the required payment will increase in the same manner at $100.00 per day for each successive week that Mr. Knox fails to comply with the Court's order of February 23, 1998.

This Court further ORDERS that commencing Monday, August 24, 1998, defendant the Boston Globe newspaper is to pay to the Suffolk County Superior Court Civil Clerk the sum of $1000.00 per day unless and until it complies with the Court's discovery order of February 23, 1998. Commencing August 31, 1998, the required payment will increase to $2000.00 per day. Commencing September 7, 1998, the required payment will increase to $3000.00 per day. Commencing each Monday thereafter, the required payment will increase in the same manner at $1000.00 per day for each successive week that the Boston Globe newspaper fails to comply with the Court's order of February 23, 1998.

s/Peter M. Lauriat
Peter M. Lauriat
Justice of the Superior Court

Dated: August 13, 1998

MOTION FILED
JUL 7 - 2005

(3)

No. 04-1634

IN THE
Supreme Court of the United States

GLOBE NEWSPAPER COMPANY, INC. and RICHARD A. KNOX,
Petitioners,

v.

LOIS J. AYASH, M.D.,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*; AND BRIEF *AMICI CURIAE* OF ABC, INC.; ADVANCE PUBLICATIONS, INC.; THE ASSOCIATED PRESS; CBS BROADCASTING INC.; GANNETT COMPANY, INC.; THE HEARST CORPORATION; MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION; METROCORP; NEW ENGLAND NEWSPAPER ASSOCIATION; NEW ENGLAND PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; NYP HOLDINGS, INC.; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; AND TIME INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

LAURA R. HANDMAN
(Counsel of Record)
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W.
Washington, D.C. 20005
(202) 508-6600

(Of Counsel listing on inside cover)

OF COUNSEL

Henry S. Hoberman
ABC INC.
77 West 66th Street
16th Floor
New York, NY 10023-6298

Patricia A. Clark
ADVANCE PUBLICATIONS, INC.
c/o Sabin Bermant & Gould LLP
Four Times Square
New York, NY 10036

David A. Schulz
THE ASSOCIATED PRESS
c/o Levine Sullivan Koch & Schulz, LLP
230 Park Avenue
New York, NY 10169

Susanna M. Lowy
Anthony M. Bongiorno
Naomi B. Waltman
CBS BROADCASTING INC.
51 West 52nd Street, 36th Floor
New York, NY 10019-3737

Barbara W. Wall
GANNETT COMPANY, INC.
7950 Jones Branch
McLean, VA 22107

Eve B. Burton
Jonathan Donnellan
THE HEARST CORPORATION
959 Eighth Avenue, Suite 220
New York, NY 10019-3737

Peter J. Caruso, Sr.
MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION and NEW ENGLAND NEWSPAPER ASSOCIATION
c/o Caruso & Caruso, LLP
One Elm Square
Andover, MA 01810

Robert A. Bertsche
METROCORP and
NEW ENGLAND PRESS ASSOCIATION
c/o Prince, Lobel, Glovsky & Tye LLP
585 Commercial Street
Boston, MA 02109-1024

Rene P. Milam
NEWSPAPER ASSOCIATION OF AMERICA
1921 Gallows Road, Suite 600
Vienna, VA 22182-3900

Jan F. Constantine
NYP HOLDINGS, INC.
1211 Avenue of the Americas
New York, NY 10036

Lucy A. Dalglish
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209

Bruce W. Sanford
Robert D. Lystad
Bruce D. Brown
SOCIETY OF PROFESSIONAL JOURNALISTS
c/o Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036

Robin Bierstedt
TIME INC.
1271 Avenue of the Americas
New York, NY 10020

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF ABC, INC.; ADVANCE PUBLICATIONS, INC.; THE ASSOCIATED PRESS; CBS BROADCASTING INC.; GANNETT COMPANY, INC.; THE HEARST CORPORATION; MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION; METROCORP; NEW ENGLAND NEWSPAPER ASSOCIATION; NEW ENGLAND PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; NYP HOLDINGS, INC.; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; AND TIME INC. IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, ABC, Inc.; Advance Publications, Inc.; The Associated Press; CBS Broadcasting Inc.; Gannett Company, Inc..; The Hearst Corporation; Massachusetts Newspaper Publishers Association; Metrocorp; New England Newspaper Association; New England Press Association; Newspaper Association of America; NYP Holdings, Inc.; The Reporters Committee for Freedom of the Press; Society of Professional Journalists; and Time Inc.. respectfully requests leave to file the attached brief *amici curiae* in support of Petitioners, Globe Newspaper Company, Inc. and Richard A. Knox. Petitioners have consented to the filing of this brief. Respondent refused to give her consent.

Amici, which are individually described in Appendix A, include leading news organizations in Massachusetts, greater New England, and throughout the United States, as well as related professional and trade associations. They share an interest in promoting excellence in journalism and in defending the freedom of the press. Of particular interest here, *Amici* are committed to preventing undue legal burdens from being imposed upon investigative reporters' ability to use confidential sources, to safeguard the identities of such

sources, and to report on matters of serious public interest confident that liability cannot be imposed without the constitutional requirements of falsity and fault having been met. Media coalitions like the one here have participated in this Court on numerous occasions.

In this case, the Massachusetts Supreme Judicial Court affirmed a default judgment, leading to a $2.1 million jury verdict, against a newspaper and its reporter as punishment for their declining to reveal the identities of confidential sources. The principal basis for this verdict, a libel claim Respondent had asserted against them, was not even implicated in the discovery dispute. And the remaining basis for the verdict, other tort claims against the reporter, were never shown to have any potential merit whatsoever.

Amici believe the Massachusetts Supreme Judicial Court's decision, which sweeps under the rug the substantial federal constitutional authority at odds with the result it reaches, presents a serious threat to the freedom of the press. *Amici* and their members often are involved in disputes concerning the identities of confidential news sources, and they often have been forced to litigate these issues. *Amici* often are faced with the untenable choice *The Boston Globe* and its reporter faced here. *Amici* therefore can bring substantial experience to bear on the issues presented here – not simply in terms of legal expertise but also in terms of describing the practical impact of this decision on newsgathering and the free flow of information. *Amici* respectfully submit that its views will aid this Court in considering the Petition for Certiorari.

Respectfully submitted,

LAURA R. HANDMAN
(Counsel of Record)
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W.
Washington, D.C. 20005

(202) 508-6600

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

INTRODUCTION AND INTEREST OF *AMICI* 1

REASONS FOR GRANTING THE WRIT 2

I. This Court Should Grant Certiorari To Reaffirm That A Sanction For Failure To Divulge Information May Not Extend Beyond The Claim For Which Discovery Was Sought. 3

II. This Court Should Grant Certiorari To Clarify The Constitutional Constraints On Sanctions Against The Press That Are Related To The Claim For Which Discovery Was Sought. 5

CONCLUSION 13

APPENDIX A, Description of *Amici* A-1

TABLE OF AUTHORITIES

Cases:

DeRoburt v. Gannett Co., 507 F. Supp. 880 (D. Haw. 1981) 9

Dowd v. Calabrese, 577 F. Supp. 238 (D.D.C. 1983) 9

Downing v. Monitor Public Co., 415 A.2d 683 (N.H. 1980) 9

The Florida Star v. B.J.F., 481 U.S. 524 (1989) 6

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 6, 7

Greenberg v. CBS Inc., 69 A.D.2d 693 (N.Y. Sup. Ct. 1979) 9

Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1908) 5

Hemingway v. Fritz, 529 P.2d 264 (Idaho 1974) 8

Hovey v. Elliott, 167 U.S. 409 (1897) 5

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 6

In the Matter of a Grand Jury Subpoena, 583 N.E.2d 241 (Mass. 1992) 11

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 3

Kapiloff v. Dunn, 343 A.2d 251 (Md. 1975) 9, 10

Laxalt v. McClatchy, 116 F.R.D. 438 (D. Nev. 1987) 10

Mitchell v. Watson, 361 P.2d 744 (Wash. 1961) 8, 9

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 6, 7, 8

Oak Beach Inn Corp. v. Babylon Beacon, Inc.,
62 N.Y.2d 158 (1985) 5, 8, 9

Philadelphia News-papers, Inc. v. Hepps,
475 U.S. 767 (1986) 6

Rancho La Costa v. Penthouse, 6 Media L. Rep. 1540
(Cal. Super. 1980) 9

Sands v. News America Public Inc., 161 A.D.2d 30
(N.Y. Sup. Ct. 1990) 9, 10

Sharon v. Time Inc., 599 F. Supp. 538 (S.D.N.Y. 1984) 10

Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) 4

*Sierra Life Insurance Co. v. Magic Valley Newspapers,
Inc.*, 623 P.2d 103 (Idaho 1981) 7, 10

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) 6

*Societe Internationale Pour Participations Industrielles et
Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) 5

Wright v. The Fred Hutchinson Cancer Research Center,
206 F.R.D. 679 (W.D. Wash. 2002) 4

Statute:

Mass. R. Civ. P. 37 5

INTRODUCTION AND INTEREST OF *AMICI*

Amici, which are individually described in Appendix A, include leading news organizations in Massachusetts, greater New England, and throughout the United States, as well as related professional and trade associations.[1] They share an interest in promoting excellence in journalism and in defending the freedom of the press to report on matters of public concern. Of particular interest here, *Amici* are committed to preventing undue legal burdens from being imposed upon investigative reporters' ability not only to use confidential sources and to safeguard the identities of such sources, but to report on matters of public concern confident that such reporting will be accorded full constitutional protection.

The Massachusetts Supreme Judicial Court's decision in this case places these longstanding journalistic values at great risk. It imposes a punishment for failure to comply with an order to disclose a confidential source – a default judgment and a $2.1 million verdict – that is far more severe than necessary to address the consequences of the nondisclosure. Even worse, the basis for part of the default judgment and the vast bulk of damages is a libel claim that was wholly unrelated to the discovery dispute. Serious constitutional problems arise not only from the overzealous nature of the default judgment itself but also from the fact that it was imposed following a *successful* appeal of the court's prior disclosure order. The judgment also imposes tort liability on the media, in violation of well established First Amendment precedent, in the absence of any finding that the publications were false or published with fault.

---

[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

This Court should grant certiorari to make it clear that the Due Process Clause and the First Amendment prohibit a court from entering a default libel judgment against the press for declining to comply with a disclosure order, much less from leaving it to a jury to assign a whopping monetary "sanction" for such a discovery dispute. The decision below inaugurating open season on *Amici* and other media, subjecting them to multi-million dollar verdicts based on libel claims, no matter how without merit, whenever their reporting uses confidential sources whose identities they do not want to reveal.

REASONS FOR GRANTING THE WRIT

Respondent in this case sued Dana-Farber Cancer Institute and one of its employees for various torts; Petitioners (the Globe and its reporter, Richard Knox) for libel; and Knox for intentional infliction of emotional distress and interference with business opportunity. Respondent conceded she did not need to know the identities of the Globe's confidential sources "to pursue her libel claims." Pet. App. 46a; *see also* Pet. App. 78a n.1, 87a. Respondent, however, sought the identities of the Globe's sources "in order to pursue her claims against Knox for intentional infliction of emotional distress and against Dana-Farber for invasion of privacy and breach of the implied covenant of good faith and fair dealing." Pet. App. 46a. When the Globe declined to abide by the trial court's disclosure order, the trial court entered a default judgment against Petitioners on all claims against them. This judgment warrants review with respect to the libel claim, as well as with respect to the claims against Knox.

I. This Court Should Grant Certiorari To Reaffirm That A Sanction For Failure To Divulge Information May Not Extend Beyond The Claim For Which Discovery Was Sought.

The default judgment on Respondent's libel claims – claims with respect to which Respondent conceded the identities of the Globe's sources were irrelevant, Pet. App. 46a, 78a n.1, 87a – generated a jury verdict for almost $2 million in damages. Pet. for Cert. 8. Petitioners amply have explained to the Court how the Massachusetts Supreme Judicial Court's ruling upholding this judgment squarely conflicts with the settled due process rule requiring a discovery sanction to be "specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 706-07 (1982). The ruling, as Petitioners also explain, is doubly unconstitutional because it allows a public-figure plaintiff to recover damages for libel without proving any publication was false or that the press acted with actual malice. Pet. for Cert. 10-13.

Amici will not repeat Petitioners' arguments. But *Amici* do wish to emphasize that the need for certiorari is particularly pressing here because the Massachusetts Supreme Judicial Court did not just reject Petitioners' constitutional arguments; despite several pages of briefing from Petitioners and *amici*, it ignored them altogether. *See* Br. of Appellees (and Cross-Appellants) Globe Newspaper Co., Inc. and Richard A. Knox, *Ayash v. Dana-Farber Cancer Inst.*, No. SJC-09236, at 16-28; Br. of *Amici Curiae* ABC, Inc. et al., No. SJC-09236, at 27-29. Consequently, if left undisturbed, the decision below will signal to other courts not only that draconian contempt sanctions against the press are permissible but that they do not even raise federal issues. While this Court's hands might be tied if the appropriate federal objections had not been raised below, that

is hardly the case here. Petitioners raised constitutional objections to the default judgment at each stage of the proceedings. Accordingly, this Court should send a strong signal to state courts that they have a duty to address and respect such constitutional objections.

This Court's intervention also is needed to squelch the potential for abuse that the Massachusetts Supreme Judicial Court's opinion creates. Plaintiffs often pursue lawsuits based on information they learn in the press. *See, e.g., Shoen v. Shoen,* 5 F.3d 1289 (9th Cir. 1993); *Wright v. The Fred Hutchinson Cancer Research Center,* 206 F.R.D. 679 (W.D. Wash. 2002). Plaintiffs in such cases may seek discovery from the press according to third-party discovery rules. But prior to the decision here, the press did not risk financial liability for its own reporting if it asserted the journalistic privilege or any other defense to third-party discovery. The Massachusetts Supreme Judicial Court's ruling that a plaintiff can obtain a default libel judgment against the press, irrespective of any showing of the libel claim's merit, for the press's failure to divulge information related to *other* claims provides an incentive for plaintiffs to file meritless libel claims against the press in every case in which they might wish to seek discovery from it. The press will face threats of multimillion dollar liability for nondisclosure where before it faced only third-party discovery sanctions (which, in the context of civil suits, have never even approached the million dollar range). This Court should not countenance such a dramatic shift in litigation incentives.

II. This Court Should Grant Certiorari To Clarify The Constitutional Constraints On Sanctions Against The Press That Are Related To The Claim For Which Discovery Was Sought.

Apart from the default judgment on the libel claim against the Globe and Knox, the Massachusetts Supreme Judicial Court also upheld the trial court's entry of a default judgment with respect to Respondent's claim against Knox for intentional infliction of emotional distress and interference with business relations. These claims, which no court ever ruled had sufficient merit even to withstand Petitioners' summary judgment motion, produced a jury verdict for damages in the amount of $210,000. Pet. for Cert. 8. Unlike the situation with respect to her libel claim, Respondent asserted that the identities of the sources Petitioners refused to divulge were relevant to these claims against Knox. Pet. App. 46a, 79a. But the default judgment with respect to these latter claims is no more legitimate than with respect to the libel claims. And the threat in this context to the proper functioning of the press is no less serious.

This Court has long held that "there are [due process] limitations upon the power of courts, even in aid of their own valid processes, to [terminate] an action without affording a party an opportunity to be heard on the merits." *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 209 (1958). Although a court armed with a discovery-sanction rule such as Mass. R. Civ. P. 37 may treat a refusal to respond to a discovery request as an admission of the specific fact at issue, a court may not – as the Massachusetts Supreme Judicial Court did here – deny "all right to defend" as punishment for refusing to respond to a particular discovery request. *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 350 (1908); *see also Hovey v. Elliott,* 167 U.S. 409 (1897) (default judgment violated due process because defendant's

noncompliance did not pertain to merits of defense). This is especially so when a court, as here, acknowledges that the information sought in the discovery dispute is "peripheral at best" to the merits. Pet. App. 49a.

Furthermore, as the New York Court of Appeals has recognized, this "general rule, that the demanding party should not be granted more relief for nondisclosure than is reasonably necessary to protect legitimate interests, should be applied with special force in cases involving nondisclosure of sources by newspapers and journalists," lest "[t]he consequences of nondisclosure imposed . . . create new obstacles to newsgathering." *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 62 N.Y.2d 158, 166 (1985). This is so for four intertwining reasons. First, when, as here, a plaintiff sues the press based on news articles it has published, the First Amendment prohibits imposing tort liability upon the press unless the reporting at issue was false. *See The Florida Star v. B.J.F.*, 481 U.S. 524 (1989); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979).

Second, this Court has held that the First Amendment prohibits states from placing the "burden of proving" the truth of news stories on the press. *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964). Whenever, as here, the news story at issue is one of "public concern," the "plaintiff . . . [must] show[] that the statements at issue are false." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986).

Third, even if plaintiff proves that the press has published false statements, the First Amendment requires plaintiff demonstrate by clear and convincing evidence that the press published with the applicable degree of fault – here, actual malice since plaintiff is a public figure. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *see also*

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (fault required to recover for intentional infliction of emotional distress). Allowing juries to impose liability without a showing of fault reinstates the strict liability rule that this Court explicitly rejected in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), because of its chilling effect on reporting matters of public concern.

Fourth, even if a plaintiff proves that the press published false statements and did so with the requisite degree of fault, the First Amendment precludes requiring the press to pay damages that are not connected to actual harm that the plaintiff has suffered, such as presumed or punitive damages, unless a court also finds that the defendant acted with actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974). Allowing juries to assign damages beyond such limits "invites [them] to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." *Id.* at 349.

That is exactly what can happen when a court enters a default judgment without actually finding false statements of fact and actual malice, and it is exactly what happened in this case. Instead of imposing a financial sanction tailored to address Petitioners' failure to comply with its discovery order, the trial court essentially left it to the jury to punish Petitioners – and, even worse, allowed the jury to peg its sanction to supposed harm caused by the newspaper articles. Since nothing in those articles was ever proven actionable, there is a great danger that the jury decided to punish Petitioners for constitutionally protected conduct such as espousing an unpopular opinion or "spotlighting" a controversial individual. *See* Pet. App. 49a (describing Respondent's "spotlighting" argument). This danger of punishing such protected speech is far too great for the First Amendment to bear.

It thus should come as no surprise that in every instance of which *Amici* are aware that a trial court has entered a default judgment against the press for declining to abide by a disclosure order, that judgment has been overturned on appeal. In *Sierra Life Insurance Co. v. Magic Valley Newspapers, Inc.*, 623 P.2d 103 (Idaho 1981), for example, the trial court entered a default judgment against a newspaper for declining to reveal a confidential source relevant to a libel claim. On appeal, the Idaho Supreme Court, relying on the federal due process cases cited above and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), explained that "a defendant ought not profit from his own refusal to make discovery, but such recalcitrance should not take away those defenses which are not affected by his refusal to disclose." *Id.* at 107. It then reversed the judgment because the plaintiff was unable to show that "its inability to discover the confidential sources obstructed its ability to prove the falsity of the publications." *Id.* at 108; *see also Hemingway v. Fritz*, 529 P.2d 264, 266 (Idaho 1974) (default judgment improper if source is irrelevant to certain issues in case).

In *Mitchell v. Watson*, 361 P.2d 744 (Wash. 1961), the trial court likewise entered a default judgment against a newspaper reporter for refusing to divulge a confidential source. The Washington Supreme Court reversed, based on the federal due process "principles announced in the *Hovey* and *Hammond* cases," as well as the *Societe Internationale* case, because the source did not pertain to "all of the issues raised by the pleadings." *Mitchell*, 361 P.2d at 749. The New York Court of Appeals has reached a similar result based on due process and free speech principles. *See Oak Beach Inn*, 62 N.Y.2d at 167 (default judgment "intolerably burden[ed] the newspaper").

The Massachusetts Supreme Judicial Court's decision here conflicts with all of these decisions. It allows a public-

figure plaintiff to obtain a judgment against a journalist without requiring the plaintiff to prove the constitutional elements of falsity and actual malice – or at least to show how the identities of the sources could have allowed her to prove them. Worse yet, the Massachusetts Supreme Judicial Court held that trial courts have a "broad measure of discretion" to impose such sanctions in future cases. Pet. App. 50a (quotation omitted). This standard ignores the fundamental constitutional protections implicated by default judgments against the press.

The Massachusetts Supreme Judicial Court's decision also implicitly conflicts with scores of other decisions taking more narrowly tailored steps than default to address press refusals to comply with disclosure orders. The other decisions are all based on local jurisdictions' civil rules governing discovery sanctions. But they all respect constitutional constraints against granting default judgments against the press when plaintiffs have not shown their claims have at least potential merit.

These decisions take two kinds of actions. First, courts have barred the press from relying on the trustworthiness of confidential sources in its defense. These measures allow the jury to draw an inference, in the absence of other evidence, that the source was unreliable or did not exist. *See Dowd v. Calabrese,* 577 F. Supp. 238, 244 (D.D.C. 1983) (defendants "may not rely upon the existence of any unidentified source as evidence"); *DeRoburt v. Gannett Co.,* 507 F. Supp. 880, 886-87 (D. Haw. 1981) (failure to reveal sources creates presumption that no sources exist); *Sands v. News America Pub. Inc.,* 161 A.D.2d 30, 37 (N.Y. Sup. Ct. 1990) ("defendants should be precluded from introducing into evidence confidential information"); *Oak Beach Inn,* 62 N.Y.2d at 167 (defendant must defend action "without placing any reliance on its source"); *Downing v. Monitor Public Co.,* 415 A.2d 683, 686 (N.H. 1980) ("there

shall arise a presumption that the defendant had no source"); *Rancho La Costa v. Penthouse,* 6 Media L. Rep. 1540 (Cal. Super. 1980) (same); *Greenberg v. CBS Inc.,* 69 A.D.2d 693, 709 (N.Y. Sup. Ct. 1979) (defendants "precluded from any use of those sources and information as proof" at trial); *Kapiloff v. Dunn,* 343 A.2d 251, 257 (Md. 1975) (journalists barred from asserting that source provided any information to them); *Mitchell,* 361 P.2d at 750 (trial court may "indulge the presumption that defendant Watson admits that there was no [source] or that the [source] did not make the statement").

Such remedies "prevent defendants from using as a sword the information they are shielding from disclosure." *Sands,* 161 A.D.2d at 37. A journalist may testify that his information came from a confidential source, but these decisions allow the jury to draw an inference that a source who the journalist will not reveal really should not be considered reliable. *See, e.g., Sharon v. Time Inc.,* 599 F. Supp. 538, 583 (S.D.N.Y. 1984). Or, when the equities of the case leave no alternative, these decisions preclude a journalist even from asserting at all that "the information came from a 'reliable or confidential source,'" *Laxalt v. McClatchy,* 116 F.R.D. 438, 452 (D. Nev. 1987), or that a statement in a story was verified by such a source. *Kapiloff,* 343 A.2d at 522.

At the same time, limiting a court-ordered presumption to facts pertaining to the disputed source honors the First Amendment interests at stake and ensures that "the relief granted is no more than is reasonably necessary to protect legitimate interests." *Sands,* 161 A.D.2d at 37. If plaintiffs cannot prove elements of their claims that have nothing to do with confidential sources, they are not entitled to any presumptions on those elements, and judgment should be entered for the defendant. *See Sierra Life,* 623 P.2d at 109 (if plaintiff cannot create triable issue on element unrelated to source, judgment should be entered for defendant); *Kapiloff,*

343 A.2d at 265-71 (trial court should have entered judgment for defendant despite dispute over source because challenged statement was expression of opinion and plaintiff could not carry burden of proof on falsity). Indeed, if the law were otherwise, suing the press would be all too attractive, for any story grounded to some degree on confidential-source information – regardless of its validity – would hold out the possibility of obtaining a default judgment and millions of dollars based on the press's unwillingness to reveal the sources.

Second, courts also may impose a civil contempt order when the press refuses to disclose a source. The trial court here, in fact, entered a contempt order following Petitioners' noncompliance with its first disclosure order. But after Petitioners declined to comply with the court's second disclosure order, the court asserted that a contempt sanction would be inadequate to secure compliance. *See* Pet. App. 72a.

This conclusion was far too hasty. Petitioners, as is often the case under appellate rules, had to be held in contempt in order effectively to challenge the first disclosure order. *See, e.g., In the Matter of a Grand Jury Subpoena,* 583 N.E.2d 241, 243 (Mass. 1992). That they did so and succeeded in having that order vacated cannot provide the basis for entering an even more drastic sanction. Indeed, condoning the Massachusetts courts' view that *successfully* appealing a disclosure order justifies the sanction of default would present press defendants with an untenable Hobson's choice. When saddled with a disclosure order of dubious merit, the press would have to choose between obeying an unfounded contempt sanction or appealing but risking a default judgment for any future noncompliance and appeals.

The press should never be put to that choice when the sources are, in the Massachusetts Supreme Judicial Court's

words, "peripheral at best" to the claims and the viability of the claims has not been otherwise established. Pet. App. 49a. Whether or not protecting confidential sources comes directly within a First Amendment privilege, the chilling effect of compelled disclosure on reporting not just with respect to the story here but with respect to so many others of profound public concern (Watergate is but one recently discussed example) is altogether certain. At the very least, therefore, the First Amendment should not permit courts to compel the disclosure of sources when the courts have not yet determined that the underlying claim may be viable. The Massachusetts courts here, however, never ruled on Knox's pending summary judgment motion and the Supreme Judicial Court dismissed as a matter of law the claims against Dana-Farber for which the identity of sources was asserted to be necessary. Failing to decide those threshold questions of viability before forcing the press to choose between default and disclosure violated the Due Process Clause and First Amendment.

In sum, discovery sanctions far short of default, when administered properly, are more than adequate to address circumstances when the press does not comply with a disclosure order. This Court should grant certiorari to make clear that scuttling these options in favor of a default judgment on meritless claims punishes the press more than the Due Process Clause or First Amendment can bear.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

LAURA R. HANDMAN
(Counsel of Record)
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W.
Washington, D.C. 20005

(202) 508-6600

Attorneys for *Amici Curiae*

APPENDIX A

DESCRIPTION OF *AMICI*

ABC, Inc., through its subsidiaries, owns ABC News, the ABC Radio Network, and local broadcast television stations that gather and report news to the public. ABC produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20*, and *Nightline*.

Advance Publications, Inc., directly or through subsidiaries, publishes daily newspapers in twenty-six cities throughout the United States, including *The Republican* in Springfield, Massachusetts, and more than forty weekly business journals, including the *Boston Business Journal* and *Mass High Tech*. Advance Publications, Inc. also owns The Condé Nast Publications Inc., which publishes eighteen magazines with nationwide circulation, and Fairchild Publications, Inc.

The Associated Press, founded in 1848, is the world's oldest and largest newsgathering organization, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

CBS Broadcasting Inc., a wholly-owned subsidiary of Viacom Inc., produces and broadcasts news, public affairs and entertainment programming. CBS News produces morning, evening and weekend news programming, as well as news and public affair magazine programs such as *60 Minutes* and *48 Hours Investigates*. CBS owns and operates television stations nationwide.

Gannett Company, Inc. is an international news and information company that publishes 101 daily newspapers in the United States with a combined daily paid circulation of

7.6 million, including USA TODAY, which has a circulation of 2.2 million. Gannett publishes a variety of non-daily publications, including *USA Weekend*, a weekly newspaper magazine with a circulation of 23.7 million. The company also operates more than 130 web sites and a national news service. Gannett's twenty-two television stations cover 17.8 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines (including *Esquire*) and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

The Massachusetts Newspaper Publishers Association ("MNPA") is an association of approximately daily and weekly newspapers published throughout the Commonwealth. Its membership includes virtually all Massachusetts daily newspapers, and it is the recognized spokesman for all such newspapers in the Commonwealth. MNPA has filed briefs as an *amicus curiae* in Massachusetts appellate courts on numerous occasions over the past twenty years in matters affecting the interests of Massachusetts newspapers.

Metrocorp is the publisher of *Boston Magazine,* the Nation's second largest city magazine. *Boston Magazine* is published monthly and has been reporting on Boston's cultural and political trends since 1963.

New England Newspaper Association is the regional professional organization for the newspapers in the six New England states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. Founded in 1981, the result of a merger of two old line regional associations,

NENA services over 250 daily and weekly newspapers for the purpose of gathering and disseminating information among and for the benefit of its members, and to promote the common interests of newspapers published in New England. NENA is the central source of information for newspapers in New England circulating a monthly comprehensive newsletter and conducting 50-60 annual training sessions for the media.

New England Press Association ("NEPA") is a volunteer organization comprised of more than 460 member newspapers with a total circulation of 4.7 million and 9.5 million readers in the six-state region. NEPA was founded in 1950 for the purposes of sharing information and ideas, while promoting professionalism, growth and excellence in community journalism. NEPA administers a legal hotline offering pre- and post-publication advice free of charge, publishes a monthly bulletin distributed to every member newspaper and journalism school in New England concerning developments and trends in the newspaper industry, and offers other services designed to promote excellence in journalism.

Newspaper Association of America is a nonprofit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily circulation in the United States and a wide range of non-daily U.S. newspapers.

NYP Holdings, Inc. is the publisher of the *New York Post* newspaper (the "*Post*"). The *Post* is the country's oldest, continuously published newspaper, founded by Alexander Hamilton in 1801.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and

freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

Society of Professional Journalists is the Nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time, Fortune, Sports Illustrated, People, Money,* and *Entertainment Weekly.*

Supreme Court, U.S.
FILED
JUL 19 2005
OFFICE OF THE CLERK

(4)

No. 04-1634

IN THE

Supreme Court of the United States

GLOBE NEWSPAPER COMPANY, INC.
and RICHARD A. KNOX,

Petitioners,

v.

LOIS J. AYASH, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF

JONATHAN M. ALBANO
Counsel of Record
CAROL E. HEAD
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Attorneys for Petitioners

Of Counsel:

GEORGE FREEMAN
THE NEW YORK TIMES COMPANY

195536

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
ARGUMENT	2
A. The Contempt Sanction of a Default Judgment Directly Conflicts with Constitutional Decisions of this Court, the Federal Courts of Appeal, and State Courts of Last Resort	2
B. The Supreme Judicial Court's Decision Affirming an Order Compelling the Disclosure of Confidential Sources in Pursuit of Legally Deficient Claims Conflicts with Decisions of Fedreral Courts of Appeal and State Courts of Last Resort and Violates Petitioners' First Amendment Rights	6
CONCLUSION	10

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Adolph Coors Co. v. Movement Against Racism and the Klan, 777 F.2d 1538 (11th Cir. 1985) 3

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 7

Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334 (9th Cir. 1985) 3

General Insurance Co. of America v. Eastern Consolidated Utility, Inc., 126 F.3d 215 (3d Cir. 1997) 2

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 6

Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) 2

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 1

In re Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1982) 5

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 2

Price v. Time, Inc., __ F.3d __, 2005 WL. 1653730 (11th Cir. July 15, 2005) 7

Cited Authorities

Page

Sivelle v. Maloof, 573 F.2d 520 (1st Cir. 1967) 3

United States v. Kahaluu Const. Co., Inc., 857 F.2d 600 (9th Cir. 1988) 3

STATE CASES

Mitchell v. Watson, 58 Wash. 2d 206, 361 P.2d 744 (1961) 4

Oak Beach Inn Corp. v. Babylon Beacon, Inc., 62 N.Y.2d 158, 464 N.E.2d 967 (1984) 4

Sierra Life v. Magic Valley Newspapers, 101 Idaho 795, 623 P.2d 103 (1980) 4

OTHER

F. Frankfurter, *The Case of Sacco and Vanzetti*, § VI, The Atlantic Monthly (March 1927) 7

In her 30-page Opposition Brief, Respondent Lois J. Ayash, M.D. ("Ayash") never actually addresses the important federal constitutional issues in fact raised by the petition in this case: Whether the First Amendment and the Due Process Clause permit trial courts to enter a default judgment overriding the constitutional requirements of a public figure *libel* case as a sanction for the failure to identify confidential news sources sought exclusively for a plaintiff's *non-libel* (and legally deficient) civil tort claims.

This issue is presented clearly and simply in a recurring context – a request by a civil plaintiff for an order compelling the disclosure of confidential news sources. There are no "fact-based inquiries" required. Ayash concedes, as she must, that the confidential sources were sought exclusively for her non-libel claims and that the resulting sanction included a default judgment on her unrelated libel claims. Her statement that this case "does not involve any question about what Petitioners published" (Opp. 1) is perversely true – the $2.1 million judgment was entered in favor of a public figure without regard to whether the publications at issue were false or published with actual malice. *Compare Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 50, 52 (1988) (First Amendment "allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability") (emphasis in original).

Because of the default judgment, editorial criticisms of the Dana-Farber Cancer Institute that made no mention of Ayash, on-the-record statements by the hospital about the scope of its investigation, and accurate reports that Ayash was investigated and later reprimanded for her role in the overdose incidents lost all of their constitutional protections against libel awards despite that, as Ayash concedes, the confidential sources were not sought for her libel claims. Indeed, Globe Newspaper Company suffered a $1,680,000 libel verdict as a result of the discovery sanction *even though it was not even a party to any of the claims in which the discovery*

was sought. Ayash's extraordinary argument that no important First Amendment or Due Process issues are raised when a state court uses its discovery powers in such a manner only demonstrates the grave and far-reaching constitutional consequences of the Supreme Judicial Court's decision. The importance of the constitutional interests at stake in this case, combined with the direct conflicts between the decision of the Massachusetts Supreme Judicial Court and decisions of this Court, the federal courts of appeal, and state courts of last resort, well-warrant certiorari review.

ARGUMENT

A. The Contempt Sanction of a Default Judgment Directly Conflicts with Constitutional Decisions of this Court, the Federal Courts of Appeal, and State Courts of Last Resort.

1. The contempt sanction affirmed by the Supreme Judicial Court – entry of a default judgment on a libel claim in which the discovery was *not* sought – directly conflicts with constitutional decisions of this Court, federal courts of appeal and state courts of last resort. In *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee,* 456 U.S. 694, 706, 707 (1982), this Court ruled that, under the Due Process Clause, trial courts have no discretion to enter discovery sanctions unless they are "specifically related to the particular 'claim' which was at issue in the order to provide discovery." 456 U.S. at 707. Ayash's brief totally fails to address the conflict between the lower court's decision and *Insurance Corp. of Ireland.* Instead, she accuses respondents of failing to recognize that default judgments are permissible sanctions under *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322 (1909). Opp. 18. In so doing, she ignores that *Hammond Packing* has been definitively interpreted by this Court as limiting discovery sanctions to the particular claim in which the discovery was sought. *Insurance Corp. of Ireland,* 456 U.S. at 707. *See also General Ins. Co. of Am.* v. *Eastern Consol. Util., Inc.,* 126 F.3d 215, 220-21 (3d Cir. 1997).

2. Having averted her eyes from the lower court's direct conflict with decisions of this Court, Ayash next misreads the opinions of the Third and Ninth Circuit Courts of Appeal in a futile attempt to avoid the obvious conflict between those courts' decisions and that of the lower court. *See* Opp. 27. For example, contrary to Ayash's contention, the constitutional flaw in the sanction reviewed in *United States* v. *Kahaluu Const. Co., Inc.*, 857 F.2d 600, 602 (9th Cir. 1988), was that it was not limited to the claim in which the discovery violation occurred. *Id.* at 602. *See also General Ins. Co. of Am.*, 126 F.3d at 220-21 (due process prohibits court from ordering that designated facts be taken as true "when those facts are unrelated to the claim or defense with respect to which the discovery is sought"); *Fjelstad* v. *American Honda Motor Co., Inc.*, 762 F.2d 1334, 1342 (9th Cir. 1985) (construing *Insurance Corp. of Ireland* and *Hammond Packing* as imposing due process requirement that discovery sanctions must be specifically related to the particular claim at issue in the order to provide discovery).

3. Indeed, Ayash is so intent on ignoring the important constitutional issue — and the significant conflict — created by the lower court's decision that she cites the Eleventh Circuit's opinion in *Adolph Coors Co.* v. *Movement Against Racism and the Klan*, 777 F.2d 1538 (11th Cir. 1985) as the only court of appeals case to address the "same issue" presented here. Opp. 26. In *Coors*, however, the default judgment was entered in the same libel claim in which the discovery was sought — the very thing that did *not* happen here. 777 F.2d at 1542-43. Ayash's citation to *Sivelle* v. *Maloof*, 573 F.2d 520 (1st Cir. 1967) is similarly misplaced. Opp. 24. The *Sivelle* court simply affirmed the entry of a default judgment in a libel case as a sanction for refusing to provide discovery sought in that same libel case.

4. Moreover, neither *Coors* nor *Sivelle* dealt with sanctions enforcing orders to disclose confidential news sources. State courts of last resort that actually have addressed the issue have held — in direct conflict with the Supreme Judicial Court — that constitutional considerations

prohibit the entry of a default judgment for the refusal to disclose confidential sources unless the withheld discovery would have itself produced proof sufficient to sustain the judgment. *See Sierra Life* v. *Magic Valley Newspapers*, 101 Idaho 795, 799-801, 623 P.2d 103, 108-110 (1980) (default judgment violated due process because there was no suggestion that revelation of confidential source would have produced sufficient proof to sustain a judgment); *Mitchell* v. *Watson*, 58 Wash. 2d 206, 361 P.2d 744 (1961) (due process violation to enter default judgment on libel claim for refusal to identify source given limited relevance of source and availability of preclusive order for failure to disclose). The standard applied by these state courts of last resort directly conflicts with the decision of the Supreme Judicial Court, which affirmed a default libel judgment entered on a claim in which the discovery was not sought.

Ayash seeks to avoid the obvious conflict that exists between the Supreme Judicial Court's decision and rulings of other state courts of last resort by misreading *Sierra Life* and *Mitchell* as turning on the fact that the discovery "was not related to a claim against the party refusing to produce it." Opp. 29. Even if the cases stood for that proposition (and they do not), they still would be in direct conflict with the Supreme Judicial Court's decision, which affirmed a $1,680,000 libel judgment against the Globe even though the Globe was not a party to any of the claims in which the confidential sources were sought. The conflict between the rationales and holdings of those courts and that of the Supreme Judicial Court therefore is direct and inescapable.[1]

1. Ayash also claims that the lower court's decision does not conflict with *Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 62 N.Y.2d 158, 166-67, 464 N.E.2d 967, 971 (1984), because the latter case involved New York's shield law. The *Oak Beach* Court ruled, however, that the shield law did not provide absolute immunity from all legal consequences for refusing to disclose a confidential source; the primary ground for reversing the default judgment was that the "general rule, that the demanding party should not be granted more relief for nondisclosure than is reasonably necessary to protect legitimate interests . . . should be applied with special force in cases involving nondisclosure of sources by newspapers and journalists." 62 N.Y.2d at 166-67, 464 N.E.2d at 971.

Learning the identity of the sources was equally irrelevant to Ayash's emotional distress claim against Knox (assuming that was a legally viable claim, which it was not, *see* § B infra). Knox advised the trial court that he would not rely on the identity of the sources in any way in defending against the claim and would accept whatever finding the plaintiff proposed as to the sources' identity. March 12, 2001 Contempt Hearing Tr. 26-28, 32-35. Under these circumstances, the entry of a default judgment on the emotional distress claim as a penalty for non-disclosure was wholly punitive and conflicts with the standard applied by other state courts of last resort.

5. Ayash also contends that the default judgment raises no significant constitutional issues because lesser sanctions, such as the fines earlier imposed by the trial court, had not been effective in coercing the Globe and Knox to disclose the confidential sources. *See* Opp. 11, 16. This is "a comfortable doctrine, to which we can have but one objection: namely, that it is not true".[2] The fines earlier imposed by the trial court were immediately stayed pending appeal and, in fact, never became due and payable because the underlying contempt sanction was overturned on appeal. App. 88a. If the fines lacked efficacy, it was because they were reversed before they ever took effect, hardly a justification for entry of a more severe sanction on remand.[3]

6. Apparently recognizing that her status as a public figure makes the default judgment all the more indefensible, Ayash — incredibly — denies that that any such public figure determination was made. *See* Opp. 9, 21. Here too, there is no fact-intensive inquiry for this Court to make. The Supreme Judicial Court's holding that Ayash is a public

---

2. *In re Globe Newspaper Co.*, 729 F.2d 47, 54 (1st Cir. 1982), *quoting* H. Fielding, *Tom Jones*, Book XV, ch. 1 (speaking of the notion that virtue is rewarded).

3. As the cases cited at pages 17-18 of the Petition demonstrate, the trial court had an array of alternative sanctions available to it — all employed by other courts facing comparable situations — that it simply chose to ignore.

figure was clear and unambiguous: "This is a case where the plaintiff (unwillingly) achieved public figure status by reason of her status as chair and principal investigator of an experimental research protocol under which two patients at a prominent research institution received chemotherapy overdoses." App. 22a. *See generally Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (recognizing category of involuntary public figure).

7. None of the reasons for granting certiorari stated above or at pages 10-19 of the Petition depend in any way on the existence of a reporter's privilege or any special constitutional protections for the press. Nor, for that matter, do they depend on any findings concerning the merit (or lack thereof) of Ayash's non-libel claims that formed the basis for the underlying discovery order. They do depend, however, on an even-handed application of important First Amendment and Due Process principles to all members of the public, including the press. The Supreme Judicial Court's decision directly conflicts with decisions of this Court and lower federal and state courts applying these principles. The petition for certiorari should be granted to resolve this conflict and to review the significant constitutional issues raised by the Supreme Judicial Court's decision.

B. The Supreme Judicial Court's Decision Affirming an Order Compelling the Disclosure of Confidential Sources in Pursuit of Legally Deficient Claims Conflicts with Decisions of Federal Courts of Appeal and State Courts of Last Resort and Violates Petitioners' First Amendment Rights.

8. Pages 19-25 of the Petition addressed the conflict between the Supreme Judicial Court's ruling that the First Amendment provides absolutely no protection against the forced disclosure of confidential sources — even in pursuit of legally meritless claims — and decisions of federal courts of appeal and state courts of last resort (courts that Ayash now apparently concedes have reached contrary results). It is no answer for Ayash to assert that the Supreme Judicial

Court has recognized some common law protections for confidential news sources. The constitutional standard applied by other lower courts – including Massachusetts federal courts – requires a plaintiff seeking to compel disclosure to establish, among other things, "jury issues on the essential elements of its case not the subject of the contested discovery." *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980). *See also Price* v. *Time, Inc.*, __ F.3d __, 2005 WL 1653730 *14 (11th Cir. July 15, 2005) (First Amendment requires, *inter alia*, party seeking disclosure to present "substantial evidence" that statements are actionable). In stark contrast, the standard applied by the Supreme Judicial Court permits the forced disclosure of confidential sources in pursuit of claims that fail as a matter of law. This is a direct, outcome determinative conflict on a significant First Amendment issue justifying certiorari review.

9. Ayash argues that because trial courts have discretion to supervise discovery disputes, the discovery order in this case raises no First Amendment issues worthy of certiorari review. As Justice Frankfurter once stated, however, judicial discretion is not a "legal abracadabra," but rather "impl[ies] standards of conduct within the comprehension of the laity in whose interests they are enforced[.]" F. Frankfurter, *The Case of Sacco and Vanzetti*, § VI, The Atlantic Monthly (March 1927). Incanting the words "judicial discretion" does not alter the fact that the Supreme Judicial Court affirmed an order requiring the disclosure of confidential sources in pursuit of legally meritless claims.

10. For example, Ayash concedes that she sought the identity of the confidential sources to discover who leaked confidential information about the overdose investigations to the Globe. *See* Opp. 4, 7, 8-9. She also concedes that the trial court found that the Globe and Knox's publication of that confidential information was privileged under the First Amendment as accurate reports on a matter of legitimate public concern (a ruling from which she took no appeal).

See Opp. 5 n.2, App. 2a n.3. She does not dispute the Supreme Judicial Court's ruling that, even without the disclosure of the confidential sources, the evidence was sufficient to prove that the Dana-Farber was responsible for confidential information being leaked to the Globe and Knox. App. 22a & n.17. Nor does she (or can she) dispute the Supreme Judicial Court's further ruling that because the information leaked concerned a matter of legitimate public interest and involved a public figure, her invasion of privacy claims failed as a matter of law. App. 21a-24a. Given these rulings, the Supreme Judicial Court understandably stated that "it might be tempting" to take issue with the trial court's finding that Ayash had a compelling need for the sources' identities to pursue her non-libel claims and to "express our opinion that the identities of any confidential sources were, in the end, *peripheral at best* to the plaintiff's case." App. 48a-49a (emphasis added).

11. It is at this point that Ayash is forced to resort to sleight of hand to argue that the disclosure order raises no significant First Amendment issues and does not conflict with decisions of lower federal and state courts. She asserts, for example, that the Supreme Judicial Court reversed the $840,000 verdict against the hospital's Dr. David Livingston "because of Dr. Ayash's inability to prove that he was a direct or indirect 'confidential source.'" Opp. 13. She makes this claim despite knowing that well before trial Dr. Livingston released Knox of any pledge of confidentiality and Knox thereafter produced all of his notes concerning off-the-record interviews with Dr. Livingston, testified as to all of his conversations with Dr. Livingston, and confirmed that Dr. Livingston was not the source who provided him with the confidential investigatory documents. *See, e.g.*, January 22, 2002 Trial Tr. 104-107, January 17, 2002 Trial Tr. 64-65, January 18, 2002 Trial Tr. 37. To state that the verdict against Livingston was reversed because Ayash did not know if he was a confidential source is akin to arguing that the Special Prosecutor in the Valerie Plame investigation never learned if Karl Rove was a source of Matthew Cooper.

12. Ayash also claims that the confidential sources were essential to her claims of joint and several liability against the Globe and the Dana-Farber. Opp. 5, 16, 24. Leaving to one side the fact that she never made this argument to the trial court, it is nothing more than legal mumbo jumbo. Not only is there no issue of the collectability of the judgments against any of the defendants (the only benefit of joint and several liability), the sole claim on which Ayash ultimately prevailed against the hospital was that it fired her in retaliation for her filing a sex discrimination charge against the Dana-Farber, a claim having absolutely nothing to do with the confidential sources and providing absolutely no basis for any type of joint and several liability.

13. Ayash continues in the same vein by repeatedly arguing that the disclosure order was proper because the Globe allegedly refused to identify *non*-confidential sources. Opp. 2, 15, 19. The undisclosed elements of this sophism are as follows: (a) Knox testified that he consulted approximately 24 confidential sources on a variety of topics in the course of preparing dozens of articles on the overdoses (only some of whom provided information published by the Globe); (b) Knox also testified that in the two years *after* the overdose articles were published, he spoke to two of those 24 sources on a non-confidential basis concerning matters unrelated to the overdoses; (c) based on that testimony, Ayash propounded an interrogatory asking Knox to reveal all Dana-Farber employees or trustees who provided him with non-confidential during the two years after the articles at issue were published; and (d) Knox refused to answer the interrogatory, stating that to do so would identify a confidential source. March 12, 2001 Contempt Hearing Tr. 18-22; Defendant Richard A. Knox's Memorandum in Opposition to Plaintiff's Motion to Compel Answer to "One" Interrogatory (and exhibits thereto) (May 24, 1999). To describe this as a refusal to identify non-confidential sources strains credulity.

14. Finally, Ayash contends that the sources were relevant to her infliction of emotional distress claims against

Knox. The theory of that claim was identical to the invasion of privacy claims dismissed as a matter of law by the trial court and the Supreme Judicial Court, i.e., that Ayash's rights were violated by the disclosure and publication of confidential but newsworthy information about her. App. 2a n.3, 19a-24a; Opp. App. A. Apart from the legal insufficiency of the claim, Knox advised the trial court that he would not rely on the identity of the sources in any way in defending against the claim and would accept whatever finding the plaintiff proposed as to the sources' identity. March 12, 2001 Contempt Hearing Tr. 26-28, 32-35. The sources therefore were not relevant to, nor necessary for, any legally viable claim.

15. Compelling the disclosure of confidential sources in pursuit of legally deficient claims while ignoring obvious alternative remedies directly conflicts with the decisions of other lower courts concerning the constitutional standard governing the disclosure of confidential sources. Certiorari should be granted to resolve the conflict between the Supreme Judicial Court and other lower federal and state courts on this important constitutional issue.

CONCLUSION

Petitioners respectfully pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

JONATHAN M. ALBANO
Counsel of Record
CAROL E. HEAD
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

Attorneys for Petitioners

Of Counsel:

GEORGE FREEMAN
THE NEW YORK TIMES COMPANY